BEFORE THE

MILWAUKEE FIRE AND POLICE COMMISSION

- -

In the Matter of the Appeal of:

NIKOLAS ZENS

MPD Personnel Order 2020-76

- -

TRANSCRIPT OF PROCEEDINGS

December 14, 18, 28, 2020

8:30 a.m.

HEARING HELD:

200 E. Wells Street
Milwaukee, Wisconsin

EXHIBITS:

1 - 30 Marked/Rec'd

Reported By: Court Reporter Susan K. Taylor

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

HEARING EXAMINER: RUDOLPH KONRAD

THE COMMISSION:

COMMISSIONER ANGELA MC KENZIE
COMMISSIONER FRED CROUTHER
COMMISSIONER EVERETT COCROFT

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MR. KONRAD: Good morning. It is Monday, December 14, 2020, at approximately 8:45 a.m. This is a disciplinary appeal hearing in the matter of Nikolas Zens addressing Milwaukee Police Department Personnel Order 2020-76. My name is Rudolph Konrad. I am the hearing examiner presiding over this matter. The Fire and Police Commissioners who are serving on the hearing panel are Vice-Chair Commissioner Angela McKenzie, Commissioner Fred Crouther and Commissioner Everett Cocroft. We are now in Phase 1 of the proceedings, and will begin.

Nikolas Zens, by his attorney, Brendan Matthews, disputes the charges against him.

Could we have the appearances of counsel for the record, please? For the appellant?

MR. MATTHEWS: For the appellant, Nikolas Zens, who also appears in person, Brendan Matthews and Rebecca Meyer of Cermele and Matthews.

MR. KONRAD: Thank you. And for the city?

MR. PEDERSON: For the city appears Deputy City Attorney Robin Pederson. I expect my court officer today to be Lieutenant Benjamin Fellers.

MR. KONRAD: Thank you. Is there

anything we need to address before opening statements?

MR. PEDERSON: Just some logistic issues I would raise with you. I had identified, I believe, four witnesses for today. As of this morning, one reported to me that they must quarantine due to a COVID exposure and I have discussed this with counsel and I think what -- how I might approach this to resolve this, since we are scheduled for two days, Monday and Friday, that perhaps my final witness, the fourth witness that I expected, might be pushed to Friday, so I might, sort of, essentially suspend my case in chief today and Mr. Matthews can pick up with his Phase 1. We only had a few minutes to discuss it, but those are the general parameters we had essentially talked about. Of course, it depends on how the evidence comes in today, but I wanted to give you some fore-notice of that situation.

MR. KONRAD: Mr. Matthews?

MR. MATTHEWS: That is generally consistent. I want to make clear that I only learned about the other witnesses this morning during that brief conversation. Otherwise, we possibly would have had more time to plan for the situation in addition the witness that I learned about this morning not being available. I just want to make that clear.

MR. KONRAD: I think Mr. Pederson could rest subject to calling the additional witness and, obviously, you'd have an opportunity -- even if you complete your case, you'd have an opportunity to open it if you had to call someone to counter that witness.

MR. MATTHEWS: That witness is someone that I subpoenaed.

MR. KONRAD: Oh, I see.

MR. MATTHEWS: He is just not available today.

MR. KONRAD: I thought it was your witness.

MR. PEDERSON: Well, yes. It was first his witness, but then, because I am trying to shift things around, I am thinking we could use the same witness, but that witness is not available until Friday.

MR. KONRAD: So we are really looking at examination and cross-examination, not rebuttal witnesses, as far as you know.

MR. PEDERSON: Right.

MR. MATTHEWS: I think, without getting too far into the facts here -- I know that we just wanted to be brief on this -- I think that person is critical to Attorney Pederson's case, so he needs them on Phase 1.

MR. KONRAD: Okay. I think we can proceed in that fashion.

Mr. Pederson, do you have an opening statement?

MR. PEDERSON: Sure. Thank you. In preview of the evidence that we expect to present to the commissioners over the next couple of hearing dates, as I indicated, I do believe I have four witnesses. I do intend to call the appellant, Mr. Zens, who will describe for you the facts and the situation that night, his understanding of his training. Following that, I do intend to call Sergeant Groszczyk. He is a sergeant who reviewed as the department's essential tactic training expert, if you will, and generated a report. I expect him to testify consistent with the report where he offered an opinion that the tactics here, at least in terms of the shoot, were consistent with training and that his formal opinion on that regard was that there was no violation, essentially.

In counter to that, I do expect to call some-one to speak on the part of management. This is where the missing witness will be either Looney -- Lieutenant Looney or perhaps someone from management itself. We will see where that goes. But, essentially, what we have here is we are going to have someone speaking for

management indicating to you that despite Sergeant Groszczyk's report and his findings that there were no violations of training, it was consistent with training, that they had a different opinion, that they assessed it differently.

As I sit here right now, my understanding of the testimony -- and I just want to give you a little bit of an idea because it is a little bit complicated -- my understanding and what I expect today is for management to explain to you that they don't disagree necessarily with the decision for Officer Zens to actually make a shoot -- decide to shoot. The disagreement or the point of the charge was that they were of the opinion that the requirement for target isolation was not met here and that the exceptions that Sergeant Groszczyk provided and his opinion about why target isolation wasn't required here or could be overlooked were not consistent with their opinions regarding the total -- the totality of the circumstances.

Finally, I expect to call Sergeant Norberg. She was the Internal Affairs sergeant who conducted the investigation in this matter. For her, I don't expect a lot of testimony, just simply to explain to the commissioners the extent of her investigation so that we can satisfy that there was a full, fair and thorough

investigation.

That is all I expect to present from the chief's side on Phase 1. Thank you.

MR. KONRAD: Thank you.

Mr. Matthews?

MR. MATTHEWS: Thank you, Mr. Hearing Examiner. Thank you, Commissioners. I always appreciate your time.

As you know, this case is somewhat difficult for a variety of reasons. On the one hand, we've got an individual who was unintentionally shot. But, on the other hand, the reason why we're here today is we have a police officer who was fired for simply doing his job. And he was fired for a standard that you will see simply does not exist.

These Phase 1 proceedings are guided by 62.50 of the Wisconsin Statutes, as we know. That subsection provides that "the board shall -- I emphasize "shall" -- apply the following standards to the extent applicable."

The first standard, "whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct." The testimony is going to show that the only answer is no. Officer Zens had no idea that he'd be fired and suspended 20 days for his conduct on September 8, 2019.

It is going to be crystal clear.

2. "Whether the rule or order that the subordinate allegedly violated is reasonable."

We can get into the first charge, the 20-day suspension, but I want to focus on the second charge, the discharge. That rule is not reasonable because the testimony, again, is going to show that Internal Affairs and the chief got it wrong. Officer Zens was discharged based on a rule that does not exist. He was discharged for not having target isolation. You don't have to have target isolation before you shoot. The city, as Attorney Pederson alluded to, the chief's own expert, the only expert in this case, issued an opinion that everything Officer Zens did was within training and policy and that you don't have to have target isolation. Yet if you look at the charges, Officer Zens was fired for not having target isolation. Somehow, that is not reasonable. Again, Officer Zens is not required to have target isolation. You are going to hear testimony and the reasons why not.

3. "Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order."

Again, no. The chief's only use of force expert stated

Officer Zens' actions were within MPD policy and lawful. Not that it really matters, but the DA reached the same conclusion, and you will see that, as did everyone else who looked at this case. You are going to hear multiple sergeants and lieutenants that had the same impression. The only thing Officer Zens did wrong was use colorful language and for that colorful language, he received policy review and counseling. That's the only recommendation from the sergeants and lieutenants that looked at this -- and an acting captain.

4. "Whether the effort described under subd 3 was fair and objective."

Clearly, not. For reasons that remain unknown, Officer Zens was singled out here for conduct that routinely occurs and that is during foot pursuits when officers lose sight of the person they are pursuing. That happens all the time. You are going to hear testimony about that. Yet, Officer Zens got 20 days for that. Officer Zens also is being singled out here because he didn't have target isolation. Well, the State of Wisconsin has come down and said you don't need target isolation. MPD's own policy says you don't need target isolation. The officers are not trained that they need target isolation and yet, here we are; Officer Zens fired for not having target isolation.

5. "Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate."

This is the most important consideration, as is usually the case. Officer Zens was not required to have target isolation, so how can he discover substantial evidence that he didn't have target isolation when that is not even required? Not only is there not substantial evidence in no target isolation of that rule not being reasonable, but there is no evidence to the contrary, and you are going to see that. Again, target isolation is needed unless the greater danger exception applies. Such as the case here, in turn, this just cause factor cannot being met.

I want to touch on something that Attorney Pederson said, that basically -- and I'm paraphrasing here -- that once management got the opinion from Sergeant Groszczyk -- again, who is their only expert on this -- saying everything was within policy, they just decided to override that decision. It is going to be interesting to hear why they did that. I have no idea, but I know the people who overrode that decision don't have the same qualifications as the testimony you are going to hear from today and on Friday.

So again, discharge and suspension should be overturned without further delay. Thank you very much. I appreciate it.

MR. KONRAD: Thank you.

Mr. Pederson, do you have any witnesses?

MR. PEDERSON: I do. Let me check on availability.

NIKOLAS ZENS, having been first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth testified as follows:

MR. KONRAD: The witness is sworn.

DIRECT EXAMINATION BY MR. PEDERSON:

Q Would you, please, state your name for the record?

MR. COCROFT: Excuse me. Chair? Chair, we can't hear anything.

MR. KONRAD: Well, if he can't hear anything, he can't hear me. We'll check on it.

Can you hear me? No. They can't hear anything.

MR. PEDERSON: It is my guess that they didn't hear the opening statements. Do we want them to review the statements?

MR. KONRAD: Well, yes, I think we should review the statements. They weren't that long.

MR. PEDERSON: So should we pause

for them to be able to read them, or how can we do that? How can we accomplish that?

MR. KONRAD: The court reporter will read them.

MR. PEDERSON: Very good.

(Opening statements were read)

MR. KONRAD: Do you want to proceed with your witness?

MR. PEDERSON: Thank you.

BY MR. PEDERSON:

Q Would you, please, state your name for the record?

A Nikolas B. Zens. N-i-k-o-l-a-s. Last name is Z-e-n-s.

Q Are you the appellant in this matter?

A Yes.

Q And you were a member of the Milwaukee Police Department?

A Yes, I was.

Q When did you begin with the Milwaukee Police Department?

A I started at the police academy in December of 2017. i was terminated July of 2020.

Q When you were terminated, your rank was police officer. Is that right?

A Yes, it was.

Q Have you ever been a police officer in any other jurisdiction?

A No.
Q What did you do prior to joining MPD?
A First, I was in the Marine Corps for four years and then I worked at a restaurant and my brother's warehouse while going to school.
Q What rank did you hold within the Marine Corps?
A E-4 corporal.
Q Do you recall the evening of September 8, 2019?
A Yes, I do.
Q All right. Is that the night upon which the underlying events occurred that is the matter of this appeal?
A Yes, it is.
Q What was your assignment that day?
A I was assigned to District 7, late shift, Squad 7369, the captain's car.
Q What is the "captain's car"?
A A proactive car that, essentially, we don't really take calls for service unless they are priority 1s. We are used for traffic stops, field interviews, violent crimes.

MS. MC KENZIE: I'm so sorry. I couldn't hear you. Can you speak louder?

THE WITNESS: Yes.

MS. MC KENZIE: Captain's card?

THE WITNESS: Car, c-a-r.

MS. MC KENZIE: Captain's car.

THE WITNESS: Captain's car.

A It's used for Priority 1 calls only and then we do lots of private stops, field interviews and we respond to violent crimes throughout the city in District 7.

Q So the point of that car, as I understand it, is to have officers that are able to, sort of, self direct and be very proactive in meeting the, sort of, mission that you are given?

A Absolutely.

Q You said you worked late shift. What was your actual hours of work that day?

A Midnight to 8:00 a.m.

Q Do you recall the approximate time the first thing relevant to the underlying events here occurred?

A As far as timeline?

Q Yes.

A Maybe around 1:00 a.m.

Q What happened around 1:00 a.m.?

A My partner and I were on a traffic stop and the dispatcher came over with District 5, that they were in pursuit and they were close to District 7, so they patched us, meaning District 5's and District 7's radios were together. My partner and I then drove over a couple blocks to where the pursuit was going just to

observe and see if they needed help and that is how we got involved in that.

Q So what happened when you got involved?

A So we were parked on the west side facing south on South 27th Street just north of Auer -- West Auer Avenue and we observed the suspect vehicle at a high rate of speed going north on 27th Street disregarding the red lights, probably 60 to 70 miles an hour going through those, evading our spike strips in an extremely evasive manner and as he made his circles around the block -- couple blocks he was going, we used our spotlight. I put my spotlight on the suspect. I got a clear observation of who he was -- or what he looked like, rather. And, at one point, MPD officers used spike strips and an MP squad had spike stripes, the secondary vehicle that, as they rounded the corner to go north on 27th Street, myself and my partner picked up a secondary squad in the pursuit. Just right as we picked it up, the suspect vehicle crashed into the corner of a wall. He was trying to take an alley a little too quick. At that moment, the primary squad, the passenger exited the vehicle and was giving commands to the suspect. The suspect vehicle, he threw his vehicle in reverse and hit the primary squad. From my angle, it looked like he was very close to hitting the officer that was outside of

his squad giving commands. Officers got back inside the vehicle. The pursuit continued for half a block down the alleyway. From the alleyway, he crashed into a pole I believe it was, and a foot pursuit ensued. I observed the suspect run northbound through the yards of Auer and 26th Street, that first house on the corner. When I saw that, I hopped out of my vehicle. My first immediate glance at the suspect, he was looking at me. His shirt -- his grey shirt he was wearing was off his body, he was in, like, a tank top and his hands were completely wrapped -- I couldn't see one inch of his hands -- in his tee shirt and they were clutched in the center of his waistband. As we were running north, I am giving commands to stop, show me his hands, in colorful language. Then he looked back at me once or twice more, ignored my commands. We rounded the corner of the house. As I rounded the corner of the house right behind him, I observed a second individual in the doorway with his back against the door and as we both approached the doorway, I gave him another command to show me his hands and he immediately turned around and extended his arms in a manner in which I thought was life threatening and I -- I took my one shot then. I reassessed and observed both subjects go down. I announced on the radio that shots were fired and I

placed the one suspect in custody.
Q Okay. You testified, near the end there, that he moved his hands in a manner that you found life threatening, or words to that effect?
A That is right.
Q Okay. Could you, please, expand upon that? What specifically did he do and why did you find that threatening?
A His hands were placed in a manner where I found most suspects to have guns. When I have interacted with suspects and I found guns on them, it's usually in the front of their waistband, and that's exactly where his hands were that I could not see. And he moved his hands not outward to surrender, not upward, but he moved them in front of his body as if he was acquiring -- trying to acquire sights from a weapon and that is why I shot.
Q It is also accurate to say that at the time that he moved his hands forward, he also crouched down. Is that right?
A I don't recall him crouching down.
Q Okay. You were wearing a body worn camera that night?
A Yes, I was.
Q And there was video captured of this event?
A Yes, there was.
Q Have you been able to review that in advance of today's

hearing?

A Yes.

MR. PEDERSON: I am going to play a video that I represent to you is a video. We will have you take a look at it and see if you can confirm that. Okay?

THE WITNESS: Okay.

MR. PEDERSON: Before I proceed, perhaps we could have confirmation that they can see and hear on their end. I will play a portion of it.

MR. COCROFT: We hear you.

(Video was played)

MR. PEDERSON: I pause at the four-second mark.

Q Have you seen enough of the video to be able to identify it?

A Yes, that is my body cam.

(Video was played)

MR. PEDERSON: I stopped the video at approximately one minute and three seconds.

Q Does that depict the incident you just described?

A Yes.

Q Very good. Now you'd agree with me that significant portions of the body worn camera are very dark and it's difficult to see?

A The lighting was extremely poor, virtually pitch black.
Q Okay. But it is around this point in the video when you are in a foot pursuit with him that you indicate you observed him with his hands in front of him, perhaps under his shirt. Is that right?
A Both his hands, yes.
Q I believe you already testified that your concern at that point is perhaps he is either securing or somehow accessing a firearm. Is that right?
A Correct.
Q And that would be a firearm that might have been tucked in the front of his waistband.
A Yes.
Q Is it also accurate to say that you hadn't actually confirmed that he has a firearm at this point?
A I didn't see a firearm, no, just his hands that were concealed.

MR. COCROFT: Chair?

MR. KONRAD: Yes. Commissioner Cocroft?

MR. COCROFT: We couldn't hear the witness well. We are having a hard time distinguishing what Attorney Pederson is saying.

MR. PEDERSON: You can't hear me or can't hear the witness?

MR. KONRAD: Both of you probably, because you are not speaking into the mic.

MR. PEDERSON: Sure. I can move my mic and perhaps facilitate that.

MR. COCROFT: It is a lot better.

MR. PEDERSON: Very good. I will try to go through this video a little bit more step by step very quick. Whoops. Apparently, that's not the way you do that by pressing that button, so let me go back. I am progressing through from 50 to 55.

Q Would you agree with me that it is very difficult to see because it is so dark there? Right?

A Yes, that is right.

Q Would you agree with me this is around the area that you fired the round?

A Around the area, yes, but not the exact spot.

Q Sure, sure. So what I would like to get at here is you testified what you observed in person already about what you saw. Right? About his hands going forward?

A Correct.

Q Would you agree with me that someone watching this video can't make this out?

A You probably won't be able to see it, no.

Q Okay. But it seems this is an instance where a video, while very dark, you were able to see better even though

we can't see on the video. Right?

A There was some back light throughout the house. Obviously, you can see in the house, there is a light in the living area there and a couple houses behind there, there was some light, but in the immediate area where we were, it was pitch black.

MR. PEDERSON: So I will run it through at regular speed and this portion again and basically, I just ask you to confirm if you agree -- I know you already said it, but if you confirm that you agree that you can't actually see what is going on in terms of what the person you were pursuing does.

(Video was played)

Q Would you agree with me that someone observing the video --

A You can see both suspects -- or the one suspect and the other individual. You can't see his actions.

Q Very good. At the time you decided to make that shot, you indicated that you believed your life was in danger. Right?

A My life and the officers responding as well.

Q Okay. You were aware there was that individual that was standing directly behind the person that you were pursuing at the time you made the shot. Right?

A I saw him, yes.

Q What thoughts, if any, did you have regarding what involvement he may or may not have in the situation you were dealing with at that time?
A My observation that his back was against a door of some sort and it looked as if he was holding the door for him to come in the house.
Q Was it his safety that you were interested in protecting at that time?
A Are you referring to the other individual's?
Q Yes.
A It was my safety because I thought the suspect had a weapon.

MS. MC KENZIE: Did you believe that they both had a weapon or you just thought that the one suspect that you were after had a weapon?

THE WITNESS: Obviously, the main suspect I was after, I thought he had a weapon and as I rounded the corner, it was such a bang bang situation, I didn't really have time to observe the other suspect other than the fact that he was there.

MS. MC KENZIE: Okay.

BY MR. PEDERSON:

Q At the time the person you were pursuing put his hands forward, did you actually ever see a firearm in his hands?

A No.
Q So is it accurate to say that your perception of the life-threatening circumstances that you believe you were in at the time was based on the circumstances and his body and hand motions?
A Yes.
Q Let's take a step back. Does the department have policies as it relates to how foot pursuits are to be conducted?
A They do.
Q Did any of those policies come into relevance or did they pertain to the foot pursuit that you were involved in on this occasion?
A Yes.
Q Can you please explain your understanding how those foot pursuit policies were relevant?
A My understanding, you tell them to stop and then if you lose sight of them, that you are supposed to meter the corner which he rounded and that I lost sight of him then.
Q So is it correct to say that the policy generally requires that you maintain eye contact with the person?
A Yes.
Q That you are pursuing.
A Yes.

Q As an ideal. Not that -- not that you must, but if you can, you should. Is that right?
A Yes.
Q And if you lose eye contact with the person, does the policy -- are you required to do anything?
A To meter the corner and to get back eyes on the suspect -- or he's already gone.
Q Sure. What does it mean --

MR. KONRAD: What do you mean by "eye contact"? I mean, you and I are having eye contact now. I assume you are meaning something not quite that exact.

MR. PEDERSON: Sure. Thank you. I will clarify that.

BY MR. PEDERSON:

Q I have been using the term "eye contact." Perhaps that's --
A I understand.

MR. PEDERSON: Sure. Let's try to --

MR. KONRAD: Keep them in view?

MR. PEDERSON: Let's try to clarify the record.

BY MR. PEDERSON:

Q What is your understanding of what I say when I was

saying "eye contact"?

A Losing sight of the individual or maintaining sight at all times. So if he rounds the corner and I don't see him anymore, that would be losing sight.

Q Very good. So perhaps "maintain visual" would be a better phrase?

A Agreed.

MS. MC KENZIE: I'm so sorry. Can you give a definition of "metering"?

MR. PEDERSON: Yes. I was just about to get there.

BY MR. PEDERSON:

Q So a couple of times, you have indicated that you were required to "meter" corners. Is that right?

A Yes.

Q Can you please explain to the commissioners what it means to "meter" a corner?

A "Metering" a corner is -- in this case, I would have to stop before the corner and slowly take small steps, taking a slice of the pie, if you will, of each -- keep going around the corner until it is clear so I know there is not an ambush or he is not there waiting for me behind the corner. It is just slowing down and making sure there is nothing behind the corner that I was rounding.

Q In addition to what you have also described, another one of the directives in the policy is that you are not supposed to go directly around a corner close to the wall. Isn't that correct?
A That is correct.
Q You are trained to actually create a gap of distance which, of course, is dependent on the circumstances, but a gap of distance between the corner that you want to go around and meter from that position. Is that right?
A I agree.
Q What is the purpose of that metering, insofar as you understand it?
A To make sure there is not an ambush behind the -- on the other side of the corner.
Q Did you meter the corner that he went around here?
A No.
Q Why did you not meter that corner?
A I was really, really close to him. I was at a full sprint. There was no way he would have been able to set up an ambush in that time frame. I was just too close to him.
Q From your own perspective, should you have metered that corner?
A No. I was too close to him. It would have been, in my

eyes, detrimental to stop rather than keep going like I did.

Q In terms of your understanding of your training, are you allowed to not follow the requirement to meter if you believe that you should not?

A I don't believe so, no.

MR. KONRAD: What was his answer?

MR. PEDERSON: He said he did not believe so.

MR. KONRAD: Thank you.

BY MR. PEDERSON:

Q So as you sit here today, is it your understanding that you violated the department policy as it required metering?

A For that, yes.

Q Part of the issue that led to the need for you to take a shot here was that you were extremely close to the person you were pursuing. Right?

A Correct.

Q You had what might be called a reaction gap problem. Is that right?

A You could say that.

Q Please explain to us what you would understand you mean by saying that you had a reaction gap problem.

A He was very close to me. That is the reactionary gap.

You don't want them right on top of you.

MS. MC KENZIE: Can you repeat that?

THE WITNESS: You don't want the suspect within a certain distance, a reactionary gap. You want to have some sort of distance between you and the suspect.

BY MR. PEDERSON:

Q At the time that you fired your firearm, what was the distance between you and the person you were pursuing?

A I don't have a -- I would say somewhere between ten feet-ish.

MR. KONRAD: Did you say ten to 12?

THE WITNESS: Ten feet-ish. Somewhere in the ten-feet range.

BY MR. PEDERSON:

Q Had you metered the corner, would you agree with me that you would have been farther away from him?

A I might not have been able to see him at that point, but yes.

Q Sure, because it is possible in the time that it took you to meter, he might have gone into the house.

A Correct.

Q But regardless, you would have had a much greater distance to him than you had when you decided to just

pursue him hot on his trail. Is that right?
A Yes.
Q Looking back at it now, you've already acknowledged that you believe it was a violation, but I guess my question -- my follow-up question for you now is, is your failure to meter, when you look at it in retrospect, do you believe that was a tactical error on your part?
A No.
Q Why not?
A I was directly behind him. If I would have metered and he went in the house, that is exactly when the greater danger theory comes in because I don't know who that person is, I don't know whose house that is. He could be going in there taking hostages or he could be going in there to barricade himself or get more weapons.
Q It is also possible that he was unarmed. Right?
A It is always possible.
Q That is, in fact, what occurred here. Right?
A Turned out to be unarmed, yes.
Q It is also possible that he would not have gone into the house. Is that right?
A Say it again.
Q It is also possible that he would not have gone into the house.
A He was halfway in the house virtually when I took the

shot, so he was going in the house.

Q Are you aware of the statements of the person who was in the doorway?

A I am aware, yes.

Q You are aware that he was telling the person you were pursuing that he could not come in the house?

A I am aware of that. I am also aware of multiple different statements he gave.

MS. MC KENZIE: Multiple different --

THE WITNESS: At one point, I believe on the televised interviews, he said he was taking the garbage out, walking the dog. And I guess to officers, he stated he was not -- trying not to let the guy in. So I am aware of multiple different statements that he made.

MS. MC KENZIE: Okay.

MR. KONRAD: But this is all after the fact. At the time, you had no idea --

THE WITNESS: There was no conversation that I heard.

MR. KONRAD: You didn't hear a conversation.

THE WITNESS: No.

MR. PEDERSON: We move forward in time now past the metering issue and the pursuit.

(Video was played)

Q At what point did you draw your firearm?

A I believe it was right when I rounded the corner and I saw the second individual.

Q What made you decide to do that at that time?

A My senses were extremely heightened when I saw I was outnumbered two to one and his hands still weren't shown and he was continuing to disregard my commands to stop and show his hands and which, obviously, led to him turning around in a sudden movement and extending his arms forward.

Q Have you received training on the steps that you should take when -- when going from a -- say, a low ready position? What is a low ready position?

A Low ready would be your hands are drawn and it is, kind of, pointed at a 45 degree angle at the ground.

Q At the time prior to firing your firearm, was that the position that you had your firearm in?

A I was running with my firearm, so I guess it was, like, bouncing at a low ready.

Q Well, the point, I suppose, maybe the most important point to make there is that you weren't actually trying to acquire any target while you were pursuing him. Right?

A Not while I was running, to.

Q At what point did you decide that you wanted to fire your firearm?
A I believe I raised it as soon as he comes to a stop in the doorway. I raised my firearm and I believe I gave one more command and that is when he turned around and he extends his arm. The moment he extends his arm, I fired my shot.
Q Had you received training on the steps that you need to go through to make sure that you properly fire your service weapon in a manner consistent with the policies of the department?
A I don't understand the question.
Q Sure. Are you familiar with the concepts of target acquisition, target identification and target isolation?
A Yes.
Q What are those terms used in terms of your training? What do they relate to?
A The requirements for deadly force.
(A document was marked as Exhibit 1)
MR. MATTHEWS: Are we going to make the video Exhibit 2?
MR. PEDERSON: Is the video one or two?
MS. TRIGGS: You can make it whatever number. I was going to put it at the end.

MR. MATTHEWS: Okay. Are we still on the record?

MR. KONRAD: Sure.

MR. MATTHEWS: I briefly object to the chief's use of these manuals that I assume he is going to use. I note that for the record because they weren't provided to Officer Zens at any point and they weren't identified on the witness exhibit list.

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: I wasn't aware until now that that objection was. I thought they had been delivered to Mr. Matthews through Sergeant Fellers last week. That had been my understanding. Apparently, that was incorrect.

MR. KONRAD: It is on your exhibit list?

MR. PEDERSON: No, it is not on my witness list, but -- I mean, my exhibit list, but I do reserve the right to use any exhibits indicated by counsel and, as I said, I thought we had a mutual understanding, going into this, that we could go ahead and just use it.

MR. MATTHEWS: Again, I just want to note it for the record. I assume it will be over-ruled, but I will note, to be fair, that Lieutenant

Fellers contacted me at 5:10 on Friday night and said I could come pick up the records at the academy and I declined that offer, being that the hearing was on Monday.

MR. KONRAD: I do note in the Charges, there is a reference to these portions of this. Right?

MR. PEDERSON: That is correct.

MR. KONRAD: I think there's notice that portions of this would be an issue in the case, so the objection is overruled, but noted. Thank you.

MR. MATTHEWS: Also, just to be clear on the record, these documents are not readily accessible to the public. They need to be accessed by only law enforcement personnel with certain access, so the reason that we have these copies is that I was able to find someone with that access, nobody from the general public, not even officers can get these documents themselves. So that was the issue.

MR. KONRAD: I see.

BY MR. PEDERSON:

Q You have a document in front of you marked for identification as number one. I believe, if you were to go to near the rear -- Well, first of all, can you tell

me, looking at the first page, can you tell me what this is?

A Firearms. "A Training Guide For Law Enforcement Officers."

Q Is it correct that this is often referred to as the "DAAT" manual? D-a-a-t?

A A portion of it, yes.

Q Is this the manual that you are trained with as a police officer?

A This one says December 1, 2020. Whenever I went through the academy, sure.

MS. MC KENZIE: You have to repeat that.

THE WITNESS: I'm sorry. I said this one says December 1, 2020. I was in the academy December of 2017. Whatever changes had been made, I am not sure.

MR. KONRAD: I don't think he would know if this was used during his training.

MR. MATTHEWS: I can speak to that as well. Again, there's only been minimal changes in the updates. All three versions are the most updated version, but that was all that was available. And there are no significant changes to anything that's been testified about.

MR. KONRAD: With that statement, we can continue.

MR. COCROFT: Are you there?

MR. KONRAD: Yes, Commissioner Cocroft.

MR. COCROFT: Can you have everybody use their microphone? It's muffled when Attorney Matthews is speaking.

MR. MATTHEWS: Sure. I can't see you, but all I was saying was the manuals that we are going to have testimony on are the most updated versions, but everything that is going to be testified about has not changed since Officer Zens was trained on them.

MR. COCROFT: Outstanding. Thank you.

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: If you could please go to Page 81 of this document.

THE WITNESS: Mine only goes to 57. Mine says "firearms."

MS. MC KENZIE: Mine says "defensive and arrest tactics."

MR. PEDERSON: Sorry. I don't know what happened. We got it mixed up in the exhibits

somehow.

(Discussion off the record)

MR. PEDERSON: Commissioners, the manuals that you have in front of you, do they say "firearms" on the front or do they say "defensive and arrest tactics"?

MR. KONRAD: Mine says "defensive and arrest."

MS. MC KENZIE: Same for me.

MR. PEDERSON: And for you, Commissioners in the satellite room?

MR. COCROFT: Our manual says "defensive and arrest tactics."

MS. TRIGGS: I am just going to put that video at the end, like I said. This will be number two.

MR. PEDERSON: We are going to make that as number one.

MS. TRIGGS: Firearms is going to be number two and that video will go at the end.

MR. PEDERSON: Page No. 81, I believe.

Q I direct your attention, it says "Preclusion." Do you see that?

A Yes.

Q I'll read it.

"Before you can use deadly force, you must reasonably believe that all other options have been exhausted or would be ineffective."

Is that correct?

A Yes.

Q And then it goes into the "Target Requirements." Is that right?

A Right below it, yes.

Q All right. In summary, the Target Requirements essentially are that if you decide to shoot, you must fulfill three specific requirements. Is that right?

A With the exception of greater danger theory, yes.

Q Well, it doesn't say that here, does it?

A No.

Q The greater danger theory, as you've indicated, is an exception that is discussed specifically under Target Isolation. Isn't that right?

A Yes.

Q In terms of target requirements, you have three requirements; target acquisition, target identification and target isolation. Right?

A Right.

Q Can you tell us what your understanding of target acquisition is?

A Acquiring target, he is in front of you, you see him.
Q What is target identification?
A That I have the correct suspect I am looking at and not another individual.
Q The first line here states,
"Target identification means that you have identified your target as the source of the threat."
Did I read that right?
A Yes. "Imminent threat."
Q You are correct. Finally, we have target isolation. I will read it.
"Target isolation means that you can shoot at your target without danger of harming innocent people. If the person who shot at you from the apartment building ran out of the building and into a crowd of people, you could not shoot at him or her without endangering others."
Did I read that correctly?
A Yes.
Q And is that your understanding of what target isolation is?
A Yes.
Q Do you believe you had target isolation on the person that you fired at that day?
A No.

Q Let's go into the facts again. You indicated that you had your firearm in front of you?
A Yes.
Q As close to the low ready as you could.
A Yes.
Q That you observed that individual turn around and move his hands in a way that you thought indicated to you that he might have a firearm and that he might intend to fire it at you. Is that right?
A That is right.
Q And in that moment, you believed your life was in danger and you decided to use deadly force against him.
A My life and responding officers' lives as well, yes.
Q Very good. Where was the -- to your knowledge, was there other responding officers in the immediate vicinity?
A Officer Dillman was behind me. He was the initial pursuing squad, so I know he was on foot and I heard the other sirens coming from a distance.
Q Okay. So, according to your training at that time, would you agree with me that under the ideal circumstances, what you are supposed to do is bring your firearm into a shoot position, utilizing the sites on your -- on your firearm, acquire your target with those sites and then fire your weapon at your target?

A In an absolute perfect world, yes.
Q And that would be the ideal representation of target isolation. Is that right?
A Correct.
Q When it comes to target isolation, there are concerns about background. Is that right?
A Yes.
Q What does the concern about background mean?
A People in the background where you are shooting. Bullets can go through things.
Q So it is fair to say that at least there is a couple of concerns; that you might miss and if you did miss, you might strike a person who was not your target. Is that right?
A Yes.
Q And also, that bullets don't always stop when -- they can pass through your intended target and strike other persons. Is that right?
A Yes.
Q Okay. And when those background considerations become an issue, is that supposed to affect your decision-making in terms of using deadly force?
A Yes.
Q All right. You'd agree with me that the example that is given in the target isolation definition here is

somewhat analogous to the situation you were in, wasn't it?

A Would you repeat that?

Q The example here, it talks about how if someone runs into a crowd of people, you could not shoot without endangering others. Right?

A Right.

Q The example there is somewhat analogous to the situation you were in. There was not a crowd, but the idea was there was another person that is endangered if you shoot at your target. Right?

A Yes.

Q Okay. So then the following paragraph is where it talks about the greater danger exception. Isn't that right?

A Yes.

Q I will go ahead and read that into the record.

"The one exception to the requirement for target isolation is called the 'greater danger exception.' Essentially, this exception allows you to shoot without target isolation if the consequence of not stopping the threat would be worse than the possibility of hitting an innocent person. For example, if a deranged subject were randomly shooting people, you might be justified in firing without target isolation because if not stopped, the suspect could be expected to

continue shooting. The chance that your bullet might strike an innocent person is preferable to the likelihood of the suspect killing or injuring many others." Did I read that correctly?

A Yes, you did.

Q All right. Based on your prior comments, I believe you have decided for yourself at least, that you think that the greater danger exception applies here.

A I do, yes.

Q Okay. So I suppose for the record, before we get there, do you acknowledge that you did not meet the requirement of target isolation?

A For the initial standard, no.

Q Right. But you believe your actions that night fall under this exception.

A I do.

Q So can you please explain why you believe that is the case?

A As I stated before, when he was rounding the corner, obviously, I saw the other individual which I thought was holding the door open to let him in the house. Six months prior to that, we had an officer shot and killed in a house and probably six months prior to that one, another officer was killed regarding a house and so houses are dangerous. That was running through my mind

as soon as I crossed the corner of the one house. You can hear it in my voice. I am absolutely terrified. I legitimately thought I was going to die at that moment and I was scared and I didn't want any other officers to die or, if that was not his house, I did not want him to go into that house and hold hostages, so I took a shot. It missed.

MR. KONRAD: When you took your shot, you said you were about ten feet away.

THE WITNESS: Correct.

MR. KONRAD: About what we are here, approximately.

THE WITNESS: Roughly.

MR. KONRAD: I couldn't see. Where was the person who was hit by the bullet?

THE WITNESS: He was right behind -- I guess if you have a suspect who is right behind you, a little bit -- he was, kind of, overlapping, if you will, right behind.

MR. KONRAD: And off to the side behind?

THE WITNESS: Slightly. They were overlapping slightly.

MR. KONRAD: And could you tell how far?

THE WITNESS: Within an arm's distance.

MR. KONRAD: I see. And no other person.

THE WITNESS: Just those two, yes.

BY MR. PEDERSON:

Q So it is fair to say at the moment that you are making your decision, it is a snap decision. Right?

A Within seconds.

Q You don't have time to sit there and think about all your training and weigh every option and think about the greater danger exception or anything like that. Right?

A Preclusion was out of the question and it was shoot or, what I thought at the moment, die.

Q But what we are doing now is we have the time and the convenience to be able to actually take some time to review those policies. Right?

A Yes.

Q Okay. So again, I am just trying to understand your own position. The greater danger exception in this example seems to indicate that you should have a reason to believe that the person posed a significant verifiable threat. Would you agree with that?

A Yes.

Q So what was the significant verifiable threat that you believed you had in that moment?

A Well, I don't think it says "verifiable" in here, does it?

MR. PEDERSON: I am just summarizing. I am using my own language.

A My perception that night was that he was armed due to characteristics of an armed gunman. He was looking back at me the entire time -- or multiple times throughout the foot pursuit. His hands were in the front of his waist. He was getting target acquisition on me from looking back. Those are all signals to me that this is an armed man. It turns out he wasn't, but that was going through my head during the foot pursuit.

Q Was it also going through your head that if you missed, you might strike an innocent bystander?

A It wasn't going through my head at the moment because I was worried that I was about to die.

Q As a trained professional, aren't you supposed to take into consideration the safety of the public which you serve?

A Absolutely, but that is where the greater danger exception comes into play.

Q How so?

A Because if I hadn't shot -- Again, I did not know that

those two knew each other at the time, I didn't know he was allegedly trying to stop. What was going through my head was that he was going to go in that house, possibly take hostages, shoot more officers, shoot people in that house if it was occupied. So that was what was in my head.

Q Well, didn't -- at the time, didn't you think that they were working together?

A Yes, but that won't stop someone from doing horrible things to get away from the police.

Q You just said just now, you were afraid that he might go into that house and basically take hostages, implying that he wouldn't know those people and was just trying to use any means possible to get away from you.

A Yes. It is possible that he was going to go in that house and it is possible he was going to take hostages. I didn't know that at the time.

Q I am going back to your prior statements. Isn't it true that at the actual time, though, you believed that they knew each other and that the gentleman behind the person you shot at was helping that person?

A I don't believe I ever said that they knew each other. I believe I said that he was holding the door open trying to possibly help him.

Q Well, let's take a step back further, then. When you

said you were pursuing, he was going around the block at the time. Right?

A Absolutely.

Q And you actually observed him on his telephone.

A Cell phone.

Q Cell phone. Sure. And your belief at that time, again, the most likely scenario that you had in your mind was that he was talking to someone in the area to try and ditch his vehicle perhaps and go and hide in someone's house or something like that.

A Yes.

Q That is, essentially, what he actually was trying to do. Isn't that right?

A That is, yes.

MR. KONRAD: We will take a ten-minute break.

(Discussion off the record)

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: Sorry. I had to deal with some other matters during the break. I need a moment.

MR. KONRAD: That's okay.

MS. MC KENZIE: During the last discussion between you and Attorney Pederson, there was an indication that you saw that the suspect had a cell

phone?

THE WITNESS: That is correct. During the pursuit, he was going around in circles a couple blocks. I don't know how many times. At one point -- a couple points when he passed our squad, he had a cell phone up to his ear.

MS. MC KENZIE: When he was in the car.

THE WITNESS: Yes. Not while he was running. While he was in the car, yes.

MS. MC KENZIE: Okay. I am so sorry about that. I didn't realize that.

MR. KONRAD: You are referring to the vehicle pursuit.

THE WITNESS: The vehicle pursuit, yes.

MS. MC KENZIE: At any time, did you think that he still had the phone when you were doing the --

THE WITNESS: The foot pursuit?

MS. MC KENZIE: -- the foot pursuit, yes.

THE WITNESS: That didn't cross my mind during the foot pursuit.

MS. MC KENZIE: I am sorry. So this

whole metering around the corner, when he was doing the circles and you saw him on his phone, what were you thinking he was doing on the phone?

THE WITNESS: I -- Normally, I have seen that behavior in vehicle pursuits before and it almost always turns out they are calling a friend, a family member, someone to either come pick them up in another vehicle or letting them know that, "hey, I am over here. Come help me." It is a cry for help.

MS. MC KENZIE: So that when you earlier testified that you were metering the corner and you said that you were, like, really close and you thought that he didn't have enough time to in any way to plan or there was no way that there could possibly be an ambush because you were right on top of him during the foot pursuit, did it ever occur to you that possibly, that as he was calling that person, that something was being set up that you could have been running into?

THE WITNESS: It did not, no.

MS. MC KENZIE: I don't have anything else.

BY MR. PEDERSON:

Q Officer Zens, I am going to read something to you and you tell me if you are familiar with this.

THE WITNESS: Do I have it?

MR. PEDERSON: You don't have it in front of you.

Q This is a quote.

"Can you shoot without hitting an innocent person?"

MR. KONRAD: Could you tell us what you are reading from?

MR. PEDERSON: I am reading from a report filed by Lieutenant Looney.

MS. MC KENZIE: You are going to put it into evidence, I imagine?

MR. PEDERSON: At some point, yes. Right now, I am just trying to see if he is familiar with some language.

MR. KONRAD: Okay.

BY MR. PEDERSON:

Q This is a quote.

A From me or him?

Q This is a quote from a -- a training guide. I just want to know if you are familiar with it.

MR. KONRAD: A quote from what?

MR. PEDERSON: A training guide.

MR. KONRAD: A training guide?

MR. PEDERSON: Yes.

BY MR. PEDERSON:

Q "Can you shoot without hitting an innocent person? Even if the greater danger exception applies, you should always attempt to minimize or eliminate the chance of your rounds striking innocent persons to the degree you are able."

And that is how the quote ends. Have you heard that before?

A It doesn't ring a bell in my head. I am sure I have seen it in the manual when I was at the academy.

Q Okay. So even though you might not be familiar with that direct quote, is it your recollection that is what you were trained on?

A I don't have a recollection of that quote at all.

Q Is it consistent with your understanding of what the training is, though?

A Yes.

Q All right. So the principal that is espoused there, you agree with.

A I don't understand that. Can you rephrase it, please?

Q I will just read it again.

"Even if the greater danger exception applies, you should always attempt to minimize or eliminate the chance of your rounds striking innocent persons to the degree you are able."

Is that consistent -- is that statement consistent

with the training you received on the greater danger exception?

A Yes.

Q All right. Do you believe that you complied with that requirement?

A I do, yes.

Q How so?

A It says "attempt." I tried to hit my suspect. I attempted to hit the suspect. I was moving with the shot and it was a float shoot. I didn't have a chance to acquire my sights and it happened.

Q Okay. So could you, please, list for us what things you did, to your recollection, that would go toward minimizing or eliminating the chance of striking an innocent person?

A I tried to shoot the suspect and not the individual. Again, they were overlapped, so there was a chance that even if I shot the suspect, it wasn't going to hit the individual. That's the best as I can --

Q To summarize this, target isolation requires that you not shoot in situations where you cannot reasonably ensure that you'll hit your target. Is that right?

A The first portion of it, yes.

Q And then the exception indicates that unless you believe there is a greater danger, then you can forego

the requirement under target isolation. Is that right?

A Yes.

Q So would you agree with me that to resolve those two things, essentially, is a judgment call?

A It is possible.

MR. KONRAD: What is the last words?

MR. PEDERSON: A judgment call.

Q And your judgment in that decision was that the greater danger existed. Is that right?

A That is correct, yes.

Q And the greater danger was the threat to you, yourself, and other officers.

A Yes.

Q Such that you were justified in not acquiring your sights on your firearm and, sort of, just point shooting. Right?

A Yes.

Q Can you tell the commissioners what point shooting is?

A Point shooting is exactly what it sounds like; you point and shoot. You don't have time to acquire sights and just how quick everything happened, it turned out to be a point shoot instead of acquiring your sights, slowly squeezing the trigger, going through all the steps of firearms fundamentals. This was such a bang-bang

situation, I didn't have time to do it.

MR. KONRAD: Just for the record, I thought you mentioned three greater dangers. Danger to himself, fellow officers and what might occur if the suspect went into the house.

MR. PEDERSON: That is correct.

MR. KONRAD: You mentioned two of them in your question. There were three he mentioned in his testimony earlier.

MR. PEDERSON: Sure.

BY MR. PEDERSON:

Q I guess I will ask the follow-up question to that point. Isn't it true, though, at the time, the one that made you decide to shoot was the threat to yourself, not any others?

A The immediate threat to myself, yes.

Q Very good. Again, just to make sure that we have defined our terms and we are all on the same page, when it comes to point shooting, you'd agree with me that point shooting is when you are, essentially, pointing your firearm and acquire your target as best you can except that you have not actually utilized the sights on the firearm. Is that right?

A I will try to -- I am at the, I guess, modified low ready because I was running. When I thought the threat

existed and he pulled his arms up, I just pointed my firearm toward him and -- and pulled the trigger instead of, you know, pulling up the weapon like you are taught at the academy, acquiring the sights and then slowly squeezing the trigger, which is all Firearm Fundamental 101. It was a point shoot. It was very quick.

Q Very good. You've described -- Your decisionmaking that night, in retrospect, is there anything you could have done differently or should have done differently regarding your decision and what led up to your decision to shoot?

A No, I don't.

MR. PEDERSON: That is all I have for direct.

MR. KONRAD: Mr. Matthews?

MR. MATTHEWS: Thank you.

CROSS-EXAMINATION BY MR. MATTHEWS:

Q Officer Zens, you testified that you were in the Marines previously?

A Yes.

Q How long were you in the Marines?

A Four years from 2011 to 2015.

Q Did you get any specialized firearms training in the Marines?

A Yes. Boot camp and I was an infantry Marine, so I went

through infantry training and I also went to a course called Coaches course. Essentially, experts come in and teach other Marines how to teach other Marines how to shoot, so I was taught how to instruct on how to shoot.

Q As part of that training, did you learn about target isolation?

A Yes.

Q Is that training consistent with the DAAT guide?

A For the most part.

Q Is there a greater danger exception there, too?

A Absolutely.

Q I want to go back to the night of the incident. Were you in full uniform?

A Yes.

Q You mentioned that you were in a squad car. Was that a fully marked squad car?

A A black and white fully marked MP squad.

Q Were you driving?

A No, a passenger.

Q During the chase, how long did that last?

A The actual chase, I believe, was approximately 19 minutes. We were only in the chase for less than a minute.

Q Is that long for a chase?

A That is abnormally long, yes.
Q What was your initial mindset when you first made contact with the vehicle?
A When you hear the pursuit coming over, your senses get little heightened, obviously, and as we got closer and saw the evasiveness of the suspect vehicle and the willingness to get away and then, obviously, slamming into the squad, you get pretty worried about why this guy wants to get away so bad.
Q I apologize for doing this, but I need to backtrack on just one thing. On the captain's car, is that a choice assignment?
A Not really. I showed willingness to want to work and work hard, make an impact on the community and my supervisors noticed that and asked if I want to be on that and I said yes.
Q Is it fair to say it is a reward?
A Yes.
Q And it is sought after.
A Very, yes.
MS. MC KENZIE: Why is it sought after?
THE WITNESS: I don't want to --
BY MR. MATTHEWS:
Q It's the best assignment?

A It is. So --

MS. MC KENZIE: It's the best assignment?

THE WITNESS: It is the best assignment on late shift. On the different shifts, that's, like, I would say the highest tier of assignment you can get.

BY MR. MATTHEWS:

Q Is it considered a premier assignment?

A Yes.

Q It's generally reserved for the best officers on each shift?

A Yes.

MS. MC KENZIE: Okay.

BY MR. MATTHEWS:

Q You testified you eventually see the suspect in the car. He is on his cell phone. Right?

A Correct.

Q And eventually, he crashes?

A He hits a pole and crashes, yes.

Q And then you exit your car and chase him?

A Yes.

Q Did you receive training on foot pursuits?

A A little bit in the academy, yes.

Q How is that training done?

A The only thing I can remember from the academy is running through the hallways simulating foot pursuits.
Q Were you told what to do if you temporarily lose sight of a suspect?
A Stop and meter the corner.
Q Have you been in foot pursuits before this one?
A Many, yes.
Q Have you lost sight of suspects before?
A Yes.
Q Have you ever been counseled or given policy review for one of those foot pursuits?
A Never. I take that back. I have used colorful language in the past in foot pursuits, but never for not metering a corner.

MR. MATTHEWS: I am going to start it at 37 seconds just to run through the incident and refresh your recollection. Okay?

THE WITNESS: Okay.

(Video was played)

Q Prior to -- Let me say this. You described the suspect turning around and extending his arms out toward you. Right?
A Yes.
Q And prior to him doing that, did you ever see his hands?
A Not even an inch of it, no.

Q Where were they?
A Wrapped in a tee shirt, stuffed inside of his waistband in the front of his pants area.
Q And he was in that position as he was running from you?
A The entire time, yes.
Q Do people normally run with their hands in their waistband?
A No.
Q Did that cause you concern?
A Yes.
Q Why?
A Characteristics of an armed gunman. Normally, weapons are stored inside the waistband.
Q This guy has just lead police on a 19-minute chase, crashed into a squad car, crashed into a pole and now, he's running from the police. Right?
A Yes.
Q And did you give him commands to stop?
A Multiple commands to stop and to show his hands, yes.
Q Did he ever stop?
A No.
Q Did he show you any signs of giving up?
A No.
Q You mentioned something about target acquisition. What did you mean by that?

A The first few moments of the foot pursuit, he looks back at me and then as we round the first corner, he looked back at me again and I know that to be a trait of when someone is gaining target acquisition on you, they will look back at you to make sure they know where you are so they can harm you.
Q Is it fair to say that was just one more piece of the puzzle that made you believe that he was armed?
A Yes.
Q And the other major piece was that he had his hands in his waistband when he was running?
A Yes, and willingness to evade the police.
Q In prior foot chases, have suspects given up in response to verbal commands?
A Yes.
Q Have you had instances in foot chases where people haven't given up?
A Yes.
Q And eventually, those individuals were apprehended?
A Yes.
Q Are they usually hiding something?
A The majority of the time, yes.
Q Guns included?
A Guns included.
Q So generally, if someone doesn't give up, they might

have a firearm?

A Yes.

Q You were asked a lot of questions about metering the corner and a slice of the pie. Right?

A Yes.

Q Do you think that rounding the corner without metering would hinder your ability to apprehend him?

A No.

Q Was it more dangerous to let him potentially enter a house and create a hostage situation?

A Yes, it was.

Q Was that in your mind at the time?

A Absolutely.

Q There's been a lot of testimony about target isolation. You testified, I believe, that you didn't have it. Right?

A Yes.

Q And that is why you were fired. Right?

A That is correct.

Q Is target isolation always required?

A No.

Q Did you have time to retreat?

A No.

Q Did you have any cover?

A I did not. It was in the open.

Q Did you have any other option besides discharging your weapon?
A No.
Q You were asked some questions about what you could actually see on the video. Do you remember those questions?
A I do.
Q One of the questions was you can't see the suspect's hands go up on camera. Right?
A Correct.
Q And just because you can't see them on the camera doesn't mean that you didn't see them. Right?
A Correct.
Q What is the phrase "action beats reaction"?
A "Action beats reaction" to me means I did something in response to him. If I would have waited for his actions, then I could have been dead, or other officers.
Q Are you trained on that?
A Yes.
Q Is that what occurred here?
A Yes, it is.
Q Did you have any other option besides discharging the weapon?
A No.
Q Did you try to hit the suspect or the other person in

the doorway?

A I tried to hit the suspect.

Q Did you intend to hit the other person?

A Absolutely not.

Q Unfortunate outcome?

A The worst outcome, yes.

Q Were your actions dictated by the suspect?

A 100 percent, yes.

Q This matter was reviewed by the DA's office. Right?

A Yes, it was.

(A document was marked as Exhibit 2)

Q I have showed you what's been marked as Exhibit 2. Have you seen that document before?

A Yes.

Q What is it?

A This is my clearance letter from the district attorney regarding my shooting.

MS. MC KENZIE: Attorney, I think the other commissioners don't have it yet. Do you mind waiting?

MR. MATTHEWS: I am sorry. I didn't even think about that.

BY MR. MATTHEWS:

Q What is that document?

A This is my clearance letter from the district attorney

in regard to my shooting.

Q On the third page, it is signed by Kent Lovern, who is the chief deputy district attorney?

A Yes.

Q Turning back to the first page, the last line in the first paragraph, Mr. Lovern says,

"I find that Officer Zens did not act unreasonably under the circumstances of this incident."

Do you see that?

A Yes, I do.

Q Turn to the second page. There is the paragraph that carries over from the first page. The second line says,

"The lighting at the back of the house in contrast with the darkness in the yard behind the house makes it difficult to determine the actions of Brown during this incident."

Is that correct?

A Yes.

Q That is consistent with what you testified to today. Right?

A Yes.

Q The next paragraph down, second line.

"Brown later admitted in two separate police interviews that he did in fact have his hands in front of his waistband area as he ran from Zens."

A Yes.
Q That is consistent with your testimony. Right?
A Yes, it is.
Q Turning to the last page, the paragraph carrying over from the page before it. Second line down.
"Zens perceived distinctive arm movement as Brown attempted to enter Davis' residence with Davis standing in the back doorway of the home."
Is that what it says?
A Yes.
Q Is that consistent with your testimony?
A Yes.
Q Last paragraph, second line.
"There is no evidence to refute Zens' perceptions of the threat level presented by Brown at the time Zens fired one shot."
A Yes.
Q Is that consistent with your testimony?
A Yes, it is.
Q Did you -- as part of that investigation into your shooting, did you provide a statement to detectives at the Milwaukee Police Department?
A Yes, I did.
(A document was marked as Exhibit 3)
Q Officer Zens, you should have in front of you a document

that's been marked as Exhibit 3. Have you seen this document before?

A Yes.

Q What is it?

A This is the report from the detectives regarding my statement that I gave them.

Q The statement that is in that document is consistent with your testimony today?

A Yes.

Q You were asked some questions that talked about the reactionary gap. Do you remember that?

A Slightly, yes.

Q Do you always want the reactionary gap?

A No.

Q Aren't you also trained to close the distance?

A Yes.

Q As long as it is safe to do that. Right?

A As long as it is safe, yes.

Q Did you feel it was safe to close the distance here?

A I did.

Q In fact, you would have kept closing the distance if not for Brown's hand movements. Right?

A Correct.

Q Are you trained to allow violent suspects --

MR. COCROFT: To the chair.

MR. KONRAD: Yes?

MR. COCROFT: We can't hear Attorney Matthews. He has to speak a little louder.

MR. MATTHEWS: Sorry, sir.

BY MR. MATTHEWS:

Q Are you trained to allow violent suspects you are pursuing to enter random houses?

A No.

Q Did you want to prevent that in this case?

A Yes, I did.

Q You mentioned that you were familiar with the individual in the house and his various statements. Right?

A Yes.

Q Are you aware if you told police that he was trying not to let the suspect in?

A I was told that after the fact.

Q Are you aware that he also told detectives he went to the back door to open it?

A I was not aware of that, no.

Q Do you know why he went to open the back door if he didn't want to let the suspect in?

A No.

Q After you discharged your weapon, could you see his hands clearly?

A After I discharged, he immediately fell to the ground

and I saw his hands.

Q And you noticed that there was not a firearm in there?

A Yes.

Q Did you stop firing for that reason?

A Yes.

Q You no longer felt that the suspect was an imminent threat?

MR. PEDERSON: Objection. Leading.

MR. KONRAD: It is leading.

Why didn't you shoot him again?

THE WITNESS: Because I reassessed per my training and I noticed he did not have a firearm and was not a threat.

MR. KONRAD: You can continue, Mr. Matthews.

BY MR. MATTHEWS:

Q You were asked some questions on the DAAT guide which is Exhibit 1. Can you pull that up, please?

A I have it.

Q I'd like you to turn to Page 81. You were asked the question about preclusion, but you were not asked the question or directed to the second portion of the first paragraph where it says,

"Note that in many deadly-force situations, you will not have time or the ability to try other

options. If a subject a few feet away from you suddenly pulls a gun and threatens to shoot you, generally the only reasonable response is to fire. There is simply not enough time to try alternatives."

Is that what it says?

A That is what it says, yes.

Q Is that analogous to your situation?

A Yes.

Q You felt that an individual suddenly pulled a gun on you and you returned fire. Right?

A That is correct.

Q And there was not enough time for you to try alternatives.

A Not enough time.

Q Turn to the next page. You were asked some questions about target isolation. The last line of "Target Isolation" says,

"The chance that your bullet might strike an innocent person is preferable to the likelihood of the suspect killing or injuring many others."

Is that what it says?

A Yes.

Q Is that consistent with your training?

A Yes.

Q Did you feel -- did you feel that the chance of striking

a potentially innocent person was less dangerous than not returning fire?

A Yes.

Q Let's assume you had target isolation. Okay? I want you to make that assumption.

A Okay.

Q You could have hit the suspect and the bullet could have ricocheted off something and still hit the other individual. Right?

A Yes.

Q Again, the same assumption. You could have missed the suspect entirely. The bullet could have gone through a wall and hit somebody that you couldn't see.

A Yes.

Q So you could have target isolation, but still hit an innocent person. Right?

A That's correct.

(A document was marked as Exhibit 4)

Q You should have in front of you what's been marked as Exhibit 4. Have you seen that document before?

A Yes.

Q What is it?

A It is a portion of DAAT regarding firearms.

Q It is a specific manual or "A Training Guide For Law Enforcement Officers" regarding firearms.

A Yes.

MR. MATTHEWS: I'd like you to turn to numbered Page 54 please.

MR. PEDERSON: I am sorry. What page?

MR. MATTHEWS: 54.

BY MR. MATTHEWS:

Q At the top, it should say "Target Isolation." Are you there?

A Yes, I am there.

Q At the top, it says "Target Isolation" and there is two paragraphs below it. That is what we just discussed from the DAAT manual?

A Yes.

Q And below that, it says "Totality of Circumstances." Do you see that?

A I do.

Q Could you read that?

A Yes. Both paragraphs?

Q Yes.

A "Your judgment in a deadly-force situation is based on your reasonable perception of threat, based on the totality of circumstances known to you at the time. For example, if a suspect points a pistol at you, you are justified in using deadly force. If it turns out

later that the suspect's gun was unloaded, that does not make your decision unjustified. Your perception of the threat was reasonable under the circumstances." Next paragraph.

MR. MATTHEWS: That is fine. Stop there.

Q Has anyone that you are aware of said, in your case, that your perceptions were unreasonable?

A No.

Q In preparation for your appeal today, did you request that a forensic demonstration or 3-D animation of the incident be created?

A Yes, I did.

Q Did you ask that in anticipation of using it to rebut the testimony of the chief's expert?

A Yes.

Q And to be consistent with your own testimony?

A Yes.

Q Did you ask the creator to provide you with a declaration how the animation was created?

A Yes.

MS. MC KENZIE: I don't understand why this witness would have any knowledge -- why would he have this or why was this referenced? Was it part of his training? What does have this document have to do

with the guide?

MR. MATTHEWS: The firearms manual?

MS. MC KENZIE: Exhibit 4.

MR. MATTHEWS: It's training. So he was trained on it.

MS. MC KENZIE: This is part of his training.

MR. MATTHEWS: Correct. And also, it is mentioned in the Charges and Specifications.

MS. MC KENZIE: Thank you.

(Documents were marked as Exhibits 5 and 6)

BY MR. MATTHEWS:

Q Officer Zens, in front of you, you should have Exhibits 5 and 6.

A I have those.

Q Have you seen those documents before?

A Yes.

Q These are documents being used in your testimony?

A Yes.

Q Exhibit 5 is a declaration from the individual who created the animation?

A Yes, it is.

Q Regarding how the animation was made?

A Yes.

Q And Exhibit 6 is a CD?

A Yes.
Q Did you assist in the creation of the animation?
A I did, yes.
Q In what capacity?
A A Skype phone call. I helped recreate the scene the best I could from my memory and, while watching the body worn camera of mine, recreated the scene for him as best I could.
Q And that individual also utilized the reports from Internal Affairs. Right?
A Yes, he did.

MR. MATTHEWS: I am going to play the first --

(Video was played)

MR. PEDERSON: I'd like to object. I'd like to discuss this exhibit before we actually play it.

MR. KONRAD: Do you have an objection?

MR. PEDERSON: Yes. Well, I am objecting to the foundation that's been laid regarding the purpose and the offer of proof regarding this exhibit. I just want to indicate that I talked to counsel previously and I am not objecting to this exhibit with the understanding that it is demonstrable

only, only to illustrate the testimony of this officer. I specifically reserve -- and it is my understanding it is not even being offered for the proposition that what is depicted in this animation is -- accurately represents what is depicted in the video because you can't see what happens in the video. Right? So this is just demonstrable consistent with his testimony. It is not proof that what is depicted in the animation is contained in the video. With that understanding, I have no objection to its admission.

MR. KONRAD: Well, demonstrative evidence is never substantive. It is to assist the trier of fact to understand the testimony. I understand that that is what this is.

MR. MATTHEWS: Yes. It is demonstrative evidence used simply to lend clarity to his oral testimony. That's all it is.

MR. KONRAD: Just so we're clear, the charges are centered around the manner in which he turned the corner and that he failed, in a sense, to adequately isolate the target. There is no issue about him shooting.

MR. MATTHEWS: Right. It is only failed to have target isolation and failed to meter the corner. That's it. And again, this video just shows as

opposed to the body cam, his testimony. It's just a picture of the testimony and what he perceived. This is a side-by-side, so we have the body cam on the right and the animation with the correct lighting on the left.

(Video was played)

MR. MATTHEWS: I will play a different version of the animation.

(Video was played)

BY MR. MATTHEWS:

Q That animation, the dark version, was that consistent with the lighting that night?

A That is as close as you can get to visually how it was that night, yes.

Q Is the animation the same perspective as the body cam?

A No, it's not.

Q What is different?

A The animation is filmed from behind me versus my body cam is basically through my eyes, so the perspective is the suspect is farther away from me and appears slower than it actually is rather than how I perceived it that night.

Q Does the animation accurately depict your recollection of events?

A Yes.

Q It is consistent with your testimony today and previously?
A Yes, it is.
MR. MATTHEWS: I will play one more version.
(Video was played)
Q When the suspect's hands come out of his pants, did you think he was bringing those hands up to surrender?
A No.
Q You only thought he was bringing out a firearm. Is that fair?
A Yes.
MR. MATTHEWS: I am going to play the bright version just so we can all see it.
(Video was played)
Q Again, with the understanding this is purely a demonstrative exhibit, the audio from your body cam is perfectly synced to the animation. Right?
A Yes, it is.
Q Wherever you were positioned with the audio, does it match up in the --
A It is matched, yes.
Q After the incident and you were cleared by the DA's office, were your police powers restored?
A Yes.

Q Any issues with your performance after your police powers were restored?
A No.
Q Did former Chief Morales ever make mention of your case?
A Yes, he did.
Q What did he say?
A He mentioned to the FPC that I was not going to be terminated or disciplined in any way.
Q Who did he say that to?
A The FPC, DeVougas.
Q Former Commissioner -- former Chairman DeVougas?
A Yes.
Q And regardless of that statement, did he eventually terminate you?
A Yes, he did.
Q And the reason for your discharge was not having target isolation when you discharged your weapon?
A Yes.
Q Did you have any belief, prior to discharge, that you would be fired for your conduct on September 8, 2019?
A No, I did not.

MR. MATTHEWS: That is all I have for you on cross.

MR. KONRAD: Mr. Pederson? Any redirect?

MR. PEDERSON: Thank you.

REDIRECT EXAMINATION BY MR. PEDERSON:

Q What is the basis of your knowledge of former Chief Morales' statements?

A It was a news article that I found online regarding this. When the whole directives things were coming across --

Q Do you have that news article today?

A I don't personally.

Q As depicted in this animation that was presented, you'd agree with me that the person you are pursuing is depicted as having his hands in front of him and apparently under his shirt and in his waistband the entire time. Right?

A Yes. He also stated that to police in the report.

Q Where did he state that?

MR. MATTHEWS: Exhibit 2.

A Exhibit 2.

Q Show me in Exhibit 2. Well, no. This is a statement from the district attorney's office.

A Right.

Q Point to whatever it is you want to point to.

A "Brown later" --

MR. PEDERSON: You have to tell us where you are.

THE WITNESS: The second page, second paragraph, second sentence.

A "Brown later admitted in two separate police interviews that he did in fact have his hands in front of his waistband area as he ran from Zens."

Q Does it say he had his hands in his waistband the entire time he ran from Zens?

A No.

Q Does it say he had his hands in his waistband at the time that he got to the door?

A No.

Q Are you aware that in fact, he stated that -- he acknowledged that, at least at some point, he did, but he couldn't remember where his hands were at the time the shot was made?

A I believe I read that at some point, yes.

Q Okay. Do you know why he had his hands in front of him like that?

A I don't.

Q Are you aware that he indicated the reason why he had his hands in front is because he was putting his phone in his pocket?

A I read that, yes.

Q So you acknowledge that, to your knowledge, that is a prior statement he made.

A Yes.
Q All right. But this video, this animation, shows with certainty not only does he have his hands in front of him, but under his shirt and the animation depicts him pulling his shirt out, actually, and then bringing his hands up concealing his hands from you for a maximum period of time. Right?
A As part of the animation?
Q Yes.
A Yes.
Q I mean, do you agree with that or disagree?
A Yes.
Q Okay. And are those -- are those representations consistent with your memory of what you saw that night?
A No.
Q How is it different from what you saw that night?
A His hands came out rather than I guess his shirt. Again, it's a computer animation.
Q Is him putting his phone away or doing something other than accessing a firearm something you ever even considered that he might be doing?
A No.
Q Isn't that something you should consider?
A Due to everything in my heightened senses prior to that and everything he was doing prior to that, no. I guess

you can consider that, yes, but due to everything happening prior to that, that was not going through my head.

Q You'd agree with me that the decision to use deadly force is a very serious matter.

A The most serious, yes.

Q About as serious as you can get.

A Yes.

Q Would you also agree with me that, as a trained professional, it is incumbent upon you to not use that deadly force except in a situation where you believe you have absolutely no other choice?

A Yes.

Q Exhibit 2. This is a letter from the district attorney's office regarding their decision whether or not to charge you criminally. Right?

A Correct.

Q The district attorney doesn't make decisions regarding discipline of Milwaukee police officers, do they?

A No.

Q There is nothing in this letter that speaks to the district attorney's analysis of whether you complied with Milwaukee Police Department training and policies, does it?

A I don't believe so, no.

Q You'd agree with me that the district attorney's determination of whether or not charges are appropriate are not directly analogous to whether or not discipline is appropriate.

A Yes, I agree.

MR. PEDERSON: Very good. That is all I have.

MR. MATTHEWS: Just quickly.

MR. PEDERSON: Sure.

RECROSS EXAMINATION BY MR. MATTHEWS:

Q Are you taught to take the chance that if you wait, you might discover that Brown was just turning around or that Brown just had his cell phone?

A No.

Q And that goes back to the action versus reaction. Right?

A That is correct.

Q So the key here, if I am understanding, is that your perception was that he was armed?

A Yes.

Q And your perception was that he was going to shoot you.

A Yes.

Q And you thought your only option was to return fire.

A Yes.

Q That turned out to be a mistake.

A Yes.
Q An unfortunate one. Right?
A The worst one, yes.
Q But the manual says that could happen. Right?
A Yes.
Q As long as your perceptions are reasonable, they are okay.
A Yes.

MR. MATTHEWS: That is all I have.

MR. PEDERSON: I have follow-up.

MR. KONRAD: Go ahead.

RE-REDIRECT EXAMINATION BY MR. PEDERSON:

Q So on that limited point, based on your training, knowledge and experience, are there circumstances under which you might be under personal jeopardy, you might be exposed to a life-threatening situation, a threat, that, under those circumstances, even though that is true, it is not reasonable for you to take steps to try and neutralize that threat because of the threat that your response would pose to others?
A No, I don't think so.

MR. PEDERSON: Okay.

MR. KONRAD: Commissioners, any questions?

Mr. Cocroft?

MR. COCROFT: I have a question. You said he had his hands in his pants while he was running and, in your experience, that is when somebody is trying to conceal a weapon and I saw -- I know from what I see, a lot of young people -- a lot of people who have pants are sagging, they run with their hands so their pants don't fall and they can get away. I know that is an opinion, but is that -- that is your final answer?

THE WITNESS: Yes, that is my final answer.

MR. COCROFT: Okay. The second one, as far as his hands going up as a threat, could he have been surrendering? Did that pass through your mind that he is surrendering?

THE WITNESS: Not at that moment, no. Every other person that has surrendered in foot pursuits for me has never made that motion to me, ever.

MR. COCROFT: The other question I had was you had target acquisition, you pointed and shooted -- you shot. So it's point and shoot. Did you actually strike the suspect?

THE WITNESS: No. I struck the man standing behind him.

MR. COCROFT: Thank you.

MR. KONRAD: Anything? Mr. DeVougas (sic)?

MR. CROUTHER: While -- while you were chasing the individual -- the suspect, did you get a clear identification of that suspect?

THE WITNESS: I am sorry. I could not hear you.

MR. CROUTHER: While chasing the suspect, did you have a clear identity of the -- the individual?

THE WITNESS: Yes, I did. As he passed in the vehicle multiple times, I got clear identification of him. I put my spotlight on him and I saw him multiple times and that was the same individual that ran through the yard when I first saw him running.

MR. CROUTHER: When you discovered that the person or persons were in a door, did you pass by that door once before?

THE WITNESS: No. That was the first time we seen that door; was when I rounded the corner.

MR. CROUTHER: You went around the corner.

THE WITNESS: Yes.

MR. CROUTHER: So when you saw the

person and another person -- Did you see two people or just one person?

THE WITNESS: When I rounded the corner, I saw the suspect coming to a stop and a second individual with his back against what I perceived was a door. So two people I saw.

MR. CROUTHER: When you saw them, what was your response?

THE WITNESS: The initial thought in my head was, "okay. Now I am outnumbered two to one" and I just kept my focus on the actual suspect at the time because he was the immediate threat that I perceived at the time.

MR. CROUTHER: Did the suspect or the other person have a weapon?

THE WITNESS: Neither of them did, no.

MR. CROUTHER: So you weren't close enough to see -- I think the previous question was the person was running with his hands in his pockets and you didn't know if he had a weapon.

THE WITNESS: Correct. His hands were in his waistband, not his pockets. But they were concealed, and that is a cause for concern.

MR. CROUTHER: So when you saw the

person at the door, were his hands still in his pockets or out of his pockets?

THE WITNESS: His back was to me and from what it looked like, his hands were still in the front of his waistband.

MR. CROUTHER: So what possessed you to shoot then?

THE WITNESS: He turned around and made a motion with his arms outward like he was extending a firearm toward me.

MR. CROUTHER: That's all.

MR. COCROFT: This is Commissioner Cocroft. When he turned around, you said he was motioning like he had a weapon. Was his arms together or were they apart?

THE WITNESS: They were very close proximity, maybe a couple inches apart as if you make your hands like you were clapping. They were, kind of, together like that, but a couple inches apart and then motioned forward and out, out as I am referring to toward me.

MR. COCROFT: Okay. The other question I had was as far as background consideration, this is a home of someone and you didn't take any consideration for the people that may live in the house

before you shot?

THE WITNESS: My consideration was that he was potentially going in there to barricade himself or a hostage situation. That was my -- my initial concern.

MR. COCROFT: Okay. I get that, but then you said that most times when they are on the phone with someone, they were trying to gain cover and hide in someone's house, so that, kind of, doesn't go together?

THE WITNESS: I understand what you are saying and I did say that, but at the same time, he is willing to do what he's already done to get away from the police. In my opinion, I don't think he would have stopped regardless of if he knew the people or not to get away.

MR. COCROFT: Okay. You said you were on the force four years and you had countless pursuits. What number would be countless foot pursuits?

THE WITNESS: I had been on the department just under two years. I would say, if I had to put it in a ballpark, vehicle pursuits -- directly involved with vehicle pursuits, I would say in the 20 or 30 range. In foot pursuits, I would say in the 30 -- 20 or 30 range.

MR. COCROFT: Have you ever chased suspects on foot that had -- that were concealing drugs, would they be running in the same kind of manner?

THE WITNESS: I have chased suspects with large amounts of drugs and they weren't running with their hands in their pants like that, no.

MR. COCROFT: Well, how were they running? Did they have bags of drugs in their hands while running?

THE WITNESS: The drugs were in their pockets and they were running normally.

MR. COCROFT: Okay. So that is not a large amount of drugs.

THE WITNESS: A couple hundred pills in a pocket, I believe, is a large amount of drugs.

MR. COCROFT: Okay. I can see where you say that as far as pills. All right. That is all I have for now.

MR. CROUTHER: I have one other question.

You shot, I understand, in the direction of the individual, not at the individual.

THE WITNESS: No, sir. I -- I was entirely trying to shoot the suspect and my weapon was pointed at the suspect. It is just that the other

individual was behind him, kind of, overlapped and I missed and it struck the other suspect -- I am sorry, the other individual.

MR. CROUTHER: According to your animation, the man was behind the suspect.

THE WITNESS: I believe he is not.

MR. CROUTHER: You believe he is not?

THE WITNESS: No, he is behind him, but he is not -- he is not mirrored behind him. There should be a little overlap. I guess the individual in the red, a little bit of the right side of his body is off to the side.

MR. CROUTHER: I am just a little disturbed about that shooting. If you have a target in front of you, I know you guys are trained to use weapons as part of your graduation. I don't know how you could miss a target like that and shoot that person behind.

THE WITNESS: Well, sir, we don't really do training as regards to running and shooting. That is extremely dangerous to train. I was coming to a complete stop -- or attempting to come to a complete stop from a full sprint and when you are pointing a weapon at a full sprint, you are going to bob up and

down. Again, it was a point shoot. It was a very fluid situation.

MR. CROUTHER: You asked the suspect to raise his hands?

THE WITNESS: I asked him to show me his hands and stop.

MR. CROUTHER: So if his hands were in his pockets and he takes them out of his pockets, is he performing in the manner in which you said he did?

THE WITNESS: Again, going back to all my foot pursuits, I have never seen a suspect raise their hands in the manner he did to surrender. They are always out to the side, kind of, like an airplane or straight up in the air, not out toward myself.

MR. CROUTHER: That is all I have.

MR. COCROFT: I have one other question. There was testimony that you received firearm training in the Marines and you also taught it as well. Was that any of the scenario that you went through in the Marines or the police department where you just run around a corner and just shoot? You say hands up. I am, kind of, in agreement with Commissioner Crouther. If you say "show me your hands," they actually have to show you their hands.

THE WITNESS: I agree with you that

they need to show hands, but in a manner that is safe for everyone and not demonstrating like he had a firearm and he should not have been running with his hands in his pants concealing his hands. When I told him specifically numerous times during the foot pursuit to show me his hands, he never did. And to answer your first question, that is not a trained thing to run around the corner and shoot, but I believe there is nothing you can train for in regard to this situation. It was such a bang bang thing and foot pursuits and vehicle pursuits are inherently dangerous and they never go smoothly. They almost never go like you are trained and it is always something different and there is always a variable to these dangerous things.

MR. COCROFT: Okay. I'm not going to do the bang bang thing, but you didn't meter the corner coming around. If you had metered the corner -- I know your testimony is that you believe if he would have gone in the house, you would have took cover and stayed there all night or whatever, but -- and he could have taken hostages. But if you would have metered the corner and followed your training, would you agree this may not have happened, the shooting?

THE WITNESS: I agree it might not have happened, but it could have -- worse things could

have produced from that of me not doing that, due to my earlier testimony. Again, we did not know the reason why he was running, what he had concealed in his pants or his reasoning for wanting to get away so badly.

MR. COCROFT: But would you agree with me that had he made it into the house, you would have had the location and you could have negotiated surrender?

THE WITNESS: There is a chance for that, yes.

MR. COCROFT: Okay. Thank you.

MR. KONRAD: Any further questions?

MR. COCROFT: That's all we have here.

MR. KONRAD: Thank you. Any further questions?

Commissioner McKenzie?

MS. MC KENZIE: I do not.

MR. PEDERSON: I have no follow-up.

MR. KONRAD: Your hand is up, Mr. Matthews?

MR. MATTHEWS: I just have one question.

RE-RECROSS-EXAMINATION BY MR. MATTHEWS:

Q Commissioner Cocroft asked you some questions about the hand placement -- and so did Commissioner Crouther -- of the suspect when he -- at the end before he got shot. Right?

A Yes.

Q You have seen people put their hands up to surrender. Right?

A Yes.

Q And you testified already that the suspect gave you no sign that he was going to surrender.

A No sign, no.

Q And he's led multiple police officers on a 19-minute chase. Right?

A Yes.

Q And a foot chase?

A Yes.

Q And you issued multiple commands to give up.

A Yes.

Q And he never complied with any commands.

A No.

MR. COCROFT: Chair, we can't hear Attorney Matthews. You have to be -- speak a little louder, please. Bring the mic closer.

MR. MATTHEWS: Sir, it's on top of me.

BY MR. MATTHEWS:

Q The question is, did the suspect put his hands up to surrender?

A I didn't believe that was his purpose for showing me his hands, no.

Q If he would have put his hands up to surrender, would you have shot him?

A No.

Q Did you think you had enough time to wait to see whether he was pointing a gun at you and about to shoot you or was going to surrender?

A No. It goes back to the action beats reaction. I legitimately thought I was going to die. You could hear it in my voice, the cause for concern. No.

Q Going back to another question, you didn't round the corner and then start firing randomly. Right?

A No, I did not.

Q You rounded the corner and then you saw the situation and then you acted. Right?

A I rounded the corner, I assessed what I perceived to be a deadly threat, and I responded.

Q And, again, no one has said that your conduct was unreasonable.

A Not one person on the department.

Q That your perceptions were unreasonable.

A No.

MR. MATTHEWS: That is all I have.

MR. KONRAD: Any further questions? I have a question.

MR. COCROFT: I -- Oh, sorry.

MR. KONRAD: I have a question for the lawyers, really.

Mr. Matthews, the question for the lawyers. The way this is going with the discussion of the decision to shoot, which isn't really here. Right?

MR. MATTHEWS: I agree.

MR. KONRAD: He is shaking his head, but I am saying he is not charged with wrongful use of deadly force. In other words, there is no issue here over him discharging his firearm based on what he saw and what he believed. So how do we get to an issue about he should have taken more time to focus on the target? Isn't that a contradiction in the case? If not, why not?

MR. MATTHEWS: I think, Mr. Konrad, I was responding to that one question that came from the commissioners, so I wanted to make it clear what was going on there. I hundred percent agree with you. The issue is he was fired for not having target isolation. I think the chief needs to prove that he didn't have

target isolation or the charge goes away. I think it is that simple. We can go around it as much as we want, but --

MR. KONRAD: Maybe I am not making myself clear. If you assume that he was in fear of his life and you assume that his only alternative at that point was to shoot, that he didn't have any other alternatives, he hasn't been charged with wrongful use of deadly force. Right? He hasn't been charged with that. Where do you find room to come up with the charge that he should have taken more time, I guess, to aim?

MR. MATTHEWS: Can I answer that candidly?

MR. KONRAD: Yeah.

MR. MATTHEWS: You make it up because -- and that's what I said in my opening, because everyone in this case other than the lieutenant at Internal Affairs said everything was good to go and it's against -- I don't want to get into an argument, so I apologize, but it is against everything in the manual.

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: Yes. I am happy to respond to that. Yes, he is charged with his failure to get target isolation, but as Mr. Matthews himself had the officer expand and testify to and the content in

the SOPs and the DAAT manual, it is a totality of the circumstances analysis, so going into those surrounding facts is important to understand the set of facts that the officer made his decision within. After that, we have the decision to shoot, which I understand and I have already acknowledged that isn't really being challenged here. The real challenge is, should he have complied with the requirement to have target isolation when he shot? That leads to an analysis of greater danger exception as applied to target isolation, a judgment call that needs to be taken within the context of the totality of the circumstances and the nature of the threat that was posed. So everything that -- It sounds like it is a simple should you have -- it sounds like we are leading into the should you have shot. Not necessarily. I don't think so. We are not saying that this was a circumstance where absolutely he shouldn't have made that call. That is not the charge here. The charge is when you shot, what did you have to have in place and were you justified in taking the shot without having target isolation? That is the central issue.

MR. MATTHEWS: We've already established that he was justified in taking the shot.

MR. KONRAD: I just put the question out there because I think it will help putting

the evidence in its proper slot as it comes in here because it seems to be going a little too far on the shooting itself, but ok. Continue. Thank you for your answers.

MR. PEDERSON: Okay.

(Witness excused)

MR. PEDERSON: Very good. We're going to proceed with the next witness or --

MR. KONRAD: It's your case.

MR. PEDERSON: I call Sergeant Groszczyk.

MR. KONRAD: Excuse me. There's been a request for a five-minute break.

MR. PEDERSON: Very good.

(Discussion off the record)

ALLEN GROSZCZYK, having been first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth testified as follows:

MR. KONRAD: The witness is sworn.

DIRECT EXAMINATION BY MR. PEDERSON:

Q Would you, please, state your name for the record?

A Sergeant Allen Groszczyk.

Q Please spell your last name for the record.

A G-r-o-s-z-c-z-y-k.

Q You are an employee of the Milwaukee Police Department?

A Yes.
Q You are a sworn member?
A Yes.
Q When did you start with the Milwaukee Police Department?
A September 27, 1993.
Q What is your current rank?
A Sergeant.
Q How long have you been a sergeant?
A Since January of 2014, if I recall correctly.
Q What is your current assignment as a sergeant?
A I am the range master for the Milwaukee Police Department.
Q How long have you been the range master?
A Since November of 2014.
Q What is the range master?
A I have -- I manage and lead all firearms instruction for the department and right now, I also have included in there all tactical response training for the department. I lead all the firearms programs for the department including non-firearms training like Taser. I have instructors that teach the Taser program for the police department. I have oversight on use of force. The department comes to me in regard to use of force issues and questioning about, you know, policies, procedures, training on use of force. I have all oversight on

firearms training, defensive and arrest tactics training, tactical response training, including a lot of admin duties. I purchase all the ammunition and equipment for the department related to firearms and things like that.

Q Is it accurate to say you are also called upon on occasion within the department to, sort of, act as an internal expert?

A Yes.

Q What sorts of things are you called upon to act as any sort of internal expert?

A I sit on a committee in the department called the Use of Force Committee. We review what we call use of force outliers, so I am one of the people on that committee which includes other members of the command staff to review use of force for our department members for training issues, policy issues, things like that. I also do use of force, make determinations for the Internal Affairs Division when they have questions about issues. I also do disciplinary hearings, I have done arbitration hearings, I have also testified in civil matters regarding civil litigation brought against the city and the department regarding use of force issues.

Q Did you generate -- Strike that. Did you have anything to do with the case that is at issue here today?

A Yes.
Q What was your role in this matter?
A For all officer-involved shootings where I get called out to the scene. If I don't show up on the scene, one of my staff does if I am on vacation, out of state. If I am on vacation in state, I will respond. I responded to the scene of this shooting to do my initial assessment and gather information and I also did a -- my own report to the Internal Affairs Division regarding this shooting.
Q What is your function, as you understand it, when you prepare that report?
A I was aiding the sergeant who was investigating, which was Sergeant Norberg, with her investigation into it and the department wanted my opinion on where I believed the facts in the case revolved around or what my determination was based off of the facts of the case.
Q What sorts of opinions do you offer?
A My opinions are based off of our training, our policy, certain issues that rise up with legalities that we have seen in use of force, those kinds of issues.
Q Do you offer opinions on ultimate issues?
A I give advice. My opinions -- I give my opinions. What the department does with it is up to them.
Q Is it correct to say that you might offer opinions on

whether or not an officer complied with policy under the factual circumstances of a particular situation you are called out to? Is that correct?

A Yes, I can.

Q And your opinion, is it correct, is advisory to the chief? Is that right?

A Essentially, yes.

Q Your report isn't binding on the chief, is it?

A I don't believe it is. It is an advisory. I think I am their go-to person as far as training, training policy issues on use of force.

(A document was marked as Exhibit 7)

Q Very good. Can you please -- Well, you should have an exhibit marked in front of you as No. 7. Do you see that?

A Yes.

Q Are you familiar with that document?

A Yes.

Q What is this document?

A It is my report I wrote regarding findings of the officer-involved shooting at 3222 North 26th Street on September 8, 2019.

Q Actually, it says 2109, but I assume that is a typo?

A It is.

Q Is that the underlying issue at this appeal here?

A Yes.
Q Does this memo reflect the investigation that you conducted?
A Yes.
Q Does it include your opinions as it relates to your findings and conclusions?
A Yes.
Q Can you please walk through for the commissioners your investigation here and what led you to your findings?
A My initial part of the investigation occurs when I get called to the scene. At the scene, I have, depending on who is doing the investigation, I have different limits of accessibility to a scene. It depends on who is running the scene and who is keeping control of it. I try to get as much information as possible when I first go to a scene; all the parties involved, all the situations. Sometimes, I don't get total information because I don't have access based on if someone is deceased or not. Depending on how much access I have, I try to check -- check the situation regarding distances, time, everything related to what I need to know as far as to try to see what was going on at that scene at that moment. I also look at it from a training standpoint, policy standpoint, ethical standpoint, so I get a view of the scene to see what happened. And often, I have

assisted with investigations where other people have missed evidence. Because I have knowledge of certain things, I can -- you know, this is related to a certain piece of equipment that is -- Specifically, I've gone where there was a Taser on scenes where people don't understand that when a Taser is fired, there is tiny little pieces of paper that come out and they are walking all over them. I'm, like, "hey, there's evidence here." So I actually add to an investigation on the scene based off of what I know with my experience and expertise. So that is an initial start. I go to the scene, gather information and then I basically -- if there is anything of significance that comes out, the department may ask me to put something out in a memo, but usually, I just wait until anything comes up, whether it's disciplinary action, any kind of litigation.

Q So my question for you is, utilizing this memo to the extent it is helpful to you, would you please walk the commissioners through this investigation?

A This one, the second paragraph in, it says,

"In preparing this report, I reviewed the following material,"

the body worn camera footage from Officer Zens, the incident report and supplement numbers on there. I had

a supplement with Officer Boyack, another one with Zens, a diagram of the officer-involved shooting scene, the call history and my notes responding to the scene. I viewed all those materials.

Q Did you offer any opinions as it related to the metering issue?

A No, I didn't.

Q Is there a reason why -- Did you even look into that as part of your --

A Based off of what I saw, I am, kind of, seeing -- Based off of what I saw in the video, it was unclear to me if he had sight of him the whole time or not. It wasn't grounded in -- I couldn't tell based off the video and the lighting and it wasn't a point that came out for me, so I didn't address that. I addressed more on the target acquisition shoot.

Q Do you believe you are in a position to offer an opinion on the metering?

A I can.

Q My question for you is, presuming that he did not maintain a visual contact with the suspect as he went around the corner, would he have been required to meter that to be in compliance with the DAAT manual and department policy?

A "Requirement" is a definite, strong word. It is based

off of the situation. What is going on in the situation is -- and I have been involved, based off of my experience in foot pursuits also, there is an issue of proximates here. If I am following somebody who is fleeing from me, I might have more distance from that individual and they hit a corner and turn the corner, more than likely, it would be better for me to slow down for a moment, take the time and do metering of the corner. I will discuss metering in a second. If I have a closer distance with this individual, it might not always be the best course of action to slow down and take more time. However, metering, you can't put it into a short, little box and say, "it's always gotta be this way," because we teach metering in different situations, depending on the circumstances at hand. Metering is take your time, having distance from a corner and angle to increase your ability to see someone on the other side or see a possible threat. I can do that at different speeds. I can do it quickly or I can do it at a slow, methodical pace. So my opinion is it depends relative to the proximity to the individual and also, my ability to slow down, my momentum at that moment, because we also teaching metering at different paces, like I just said. I mean, if we do active shooter training, we teach officers to meter at an

accelerated pace. When we do what's called dynamic -- rudimentaries of dynamic clearing, we meter at an accelerated pace. It is not always slow, methodical. There's different speeds of room clearing which also relates to the street as far as foot pursuits. There's slow, methodical clearing and then there is dynamic. So it depends on what the circumstances are in which you use each one. There is some situations we would meter corners slowly. Some, we do quickly, depending on the situation.

Q And dynamic is the quick metering. Is that right?

A Yes. It's -- People think extremely fast. It doesn't have to be fast. It could just be a very smooth, slow, a fluid walk. It could be, depending on, you know, the urgency in the moment and how quickly I need to move around the corner.

Q Is it your opinion that in this case, regardless of whatever type of metering there was, there should have been some type of metering?

A Here is the issue I saw on the video. Even if he doesn't completely come to a stop and slowly meter the corner, the reality is, you are metering the corner. The reality is when I take a corner as a police officer like that in that moment, what am I doing when I am going around the corner? I don't go around the corner

like most people in society do. We go around corners and are scanning as we are moving. It is almost a disease you get because you know the dangers that lurk around corners, so it is something that just gets engrained in you. When I am in somebody's house talking to them at a certain call -- I get a domestic violence call, I'm walking and asking "who is in the house?" I'm looking around. That means as you are looking around corners, you are trying to see who is around and you are taking in information before you make that corner. So if he moved around the corner at a very accelerated pace, he is technically still taking in the information, you know, whether it is a formal, like, stop and it is slow and methodical. It might not be that way.

(A document was marked as Exhibit No. 8)

Q I present you with Exhibit 8 marked for identification. Are you able to tell me what that is?

A This appears to be an excerpt from a tactical response manual of the State of Wisconsin Law Enforcement Standards Board.

Q Is this the manual -- part of the training materials that are used to train officers on tactics?

A Yes.

Q I direct your attention to Page 17. I'd direct your

attention to the part where it says, "Officer safety should always." Do you see that?

A Yes.

Q I will read that.

"Officer safety should always be a concern. If it is unsafe to chase a suspect, set up a perimeter. If you decide to pursue, remain tactically flexible--do not allow yourself to be sucked into a mindset of, 'I'm going to catch this guy at any cost.' Be smart and don't over-commit."

Did I read that correctly?

A Yes.

Q Does that portion have application to the analysis of the situation here?

A It could. These situations are dynamic and constantly changing.

Q Okay. Then the manual goes into some examples of the general guidelines. Is that right?

A Yes.

Q All right. And one of those is to meter corners where it says,

"Maintain distance from corner. This prevents you from turning the corner directly into an ambush."

Did I read that correctly?

A Yes.

Q Is there any other references here that are applicable regarding the metering issue in this manual or elsewhere that you are aware of that the commissioners should be aware of?

A The line that says, "chase what you can see and search for what you can't."

Q Let's go on to the next two bullet points. It says,

"If you cannot see the suspect, you're at risk of blindly running into an unforeseen ambush, trap, or assault.

You could run past the suspect's location, leaving you open to assault from behind."

Did I read that correctly?

A Yes.

Q All right. Those are potential considerations that -- that an officer in Officer Zens' position should have been thinking about at the time. Right?

A It can be, yes.

Q Okay. But as we indicated, you didn't focus on that in terms of your investigation because you didn't think that is what your main objective was. Isn't that right?

A No. Like I said, the clearness of the video and things like that, I couldn't tell entirely.

Q Okay. Let's go straight to your -- the opinion that you rendered. What was the opinion that you gave to the

chief's office in this case?

A Do you want me to read my findings or just the summation of it?

Q I don't expect you to testify from the report. It is just there to facilitate you in case you want to point to something, but you can just --

A My opinion, based off what the facts were, that I reviewed, based off what I saw at the scene, based off the video, other reports -- the reports I read, and the situation, this was a -- a very chaotic situation where, based off of the nature of the danger in this situation and the fact this individual was disregarding officers' commands continually, put the community at risk, put officers at risk, even backed up into their vehicle and he still fled, disregarded official commands from uniformed officers continually, at the moment when Officer Zens ran in the backyard moving in to apprehend this individual, based off what I saw in the testimony and what I saw in the video, it's an unfortunate situation where he was close to this individual, he believed he was going to be shot, and this falls into an exception of the target isolation requirement which is a greater danger exception based off of my opinion. If he believes he's going to be shot, he does not have to wait to be shot at that moment in time, or bullets fly past

him. However, he came up in a very quick manner, fired one shot at the individual. We can discuss about that if you desire, my opinions on that. Unfortunately, based off the dynamics in a situation like that, arm complications combined with the dynamics of fluid, rapidly evolving, I believe this individual was just moving to the ground, the bullet just went over the top of his head and unfortunately, struck, I believe it was, Mr. Davis in that situation. I think, in that situation, it was a greater danger to the self, meaning greater danger to the officer at that moment based off of what his testimony was, what I saw, if he didn't shoot and I believe there was restraint involved in this also where he showed restraint. It was only one shot. This was not a whole magazine of bullets that went down at the individual and he moved right into what we consider -- what we call follow-through considerations, which is the -- the act of taking the individual into custody.

Q Are you familiar with the concept of target requirement as it applies to the use of deadly force?

A Yes.

Q What are the target requirements?

A Target requirements are part of the justification for deadly force. When we train, it's what is called --

it is also included in what is called deadly force equation. So target requirements are target acquisition, target identification and target isolation.

Q We have already entered into testimony some of the definition here of target isolation, so I won't read it now, but do you believe there was target isolation as defined by the DAAT manual in the shot that Officer Zens took?

A It wasn't a totally isolated target. There was a man behind him. They were in a staggered stance, one behind the other.

Q You are aware that Officer Zens did not line up his shot in terms of using his sights. Is that correct?

A Based off his statement and what I saw in the video, yes.

Q If someone does not acquire a target utilizing their sights, is that, per se, not target isolation?

A Target isolation is the target is isolated and maybe you are, kind of, getting at where I have an isolated sight picture, which is different. The target had a person around it, behind it.

MR. PEDERSON: Maybe it will be helpful if we go to the DAAT manual. Go to Page 82 of Exhibit 1.

THE WITNESS: I have it.

Q I will read "Target Isolation."

"Target isolation means that you cannot" -- I will start over.

"Target isolation means that you can shoot at your target without danger of harming innocent people." Did I read that right?

A Yes.

Q So based on that definition, did Officer Zens have target isolation?

A No.

Q Is it possible for someone to have a completely lined up sight picture then, using the sights, doing all the -- you know, perfect scenario and still not have target isolation?

A Sure. If somebody is in front of them or there is other people obstructed, meaning right now, the lady taking down the notes, the man behind her, the line behind her, I can put my sights on him totally. He is not a fully isolated target, but I have isolated my sights on him. It's a very precarious situation, dangerous. He is not an isolated target, but there may be a need for me to shoot past that individual.

Q But the analysis doesn't end even though you determine that there is no target isolation. Correct?

A Correct.

Q So what is the next step in making the determination of whether or not this was a good decision to shoot or not?
A Is there a justified exception, something that would rise to the level where I need to shoot even though the target is not totally isolated?
Q So can you please explain to the commissioners your analysis of that in this case?
A I will quickly glance at my report. In this case, what arose to me was that he had an exception to target isolation, meaning there was a greater danger to himself if he did not fire. So there is three criteria of greater danger exception to target isolation; danger to himself, others, the community at large. I decided it was -- based off of these circumstances, there was a greater danger to himself if he didn't fire based off his statements and the video at hand, so greater danger to himself if he didn't fire because if he stood there and waited for a response from the criminal, he doesn't want to end up being shot.
Q I direct your attention to Page 29 of your report, the second -- actually, the first full paragraph that begins "at that pivotal moment." Do you see that?
A Yes.
Q I will read it.

"At that pivotal moment, Brown abruptly turns

to face Officer Zens, while pulling his hands from his shirt toward Zens."

Did I read that right?

A Yes.

MR. KONRAD: What page are you on?

MR. PEDERSON: I'm on Page -- It is marked Bates 29 at the bottom.

Q Where are you drawing that fact from?

A Based off his testimony on his report that I read and also, what I could decipher from the video.

Q Okay. So in the video, are you indicating that you are able to see that he pulled his hands from his waist and put them forward?

A What appeared to me, I did -- I stopped it frame by frame going through it. It appeared he did turn -- the hands came from the shirt area. As he turned toward him, it came from -- from his shirt toward Zens.

Q So it is your testimony that through the video that you observed, you were able to visually confirm what Zens had said about his hands.

A I attempted to, yes.

Q It is not a matter of "attempt." I am asking you, in your preparation of this material, did you visually confirm via the video?

A I reviewed the video and his testimony.

Q Again, that is not the question. My question is, the portion of the video where he indicates that he turns -- has his hands at the waist and then puts them forward as -- you know, consistent with having a firearm, were you able to, with your own eye and reviewing the video, visually confirm those proposed facts?

A Yes.

MR. PEDERSON: Okay. So we will go to the video.

(Video was played)

Q You indicated at this point, you were going frame by frame?

A Not at this point. More toward when they are at the back of the house. I did, you know, kind of, look at the whole thing in frames, but I really did it when he was at the back to try to see what was actually going on.

MR. PEDERSON: I am going to give you this mouse and if you could manipulate for me, if you can indicate to me where it is that you believe you visually confirmed that in the video.

THE WITNESS: I want to be able to get it so it goes frame by frame. There is a tool in here that I used for frame by frame.

(Discussion of the record)

THE WITNESS: It is on evidence.com. I know there is an actual tool on the side that I can just step, step, step and frame by frame.

MR. PEDERSON: So you don't believe you'd be able to duplicate that with the equipment you have available to you today?

THE WITNESS: Let me take one more quick glance. I don't know what that says.

MR. MATTHEWS: It says -- "play in mini view" it says.

THE WITNESS: Auto play. There usually is a thing on the side here that lets me do it. And I viewed it in the actual Cloud, as it were, the storage and it lets you come up on the program where I can actually go frame by frame. I don't think I can do it frame by frame.

MR. PEDERSON: We will move on.

Q Is it true that the rest of your analysis in terms of greater danger exceptions, sort of, hinges on that fact?

A The fact of him bringing his hands up from underneath his shirt?

Q Yes.

A Based off of the testimony of Officer Zens and what his belief was at that moment in time, that is also a factor

I took into consideration.
Q In the greater danger exception -- going back to Page 82 of the DAAT manual -- it describes the greater danger exception. Right?
A Yes.
Q It indicates there that, as you have already testified, that if there is this greater danger, that one is excused, I guess -- might be a term -- from the requirements of target isolation. Is that right?
A A complete excusal, you still are -- you still have to be justified or -- or reasonable in your actions to have an exception to target isolation.
Q What is the purpose of target isolation?
A To lessen the chance of some innocent person being struck by a police officer's gunfire.
Q What is the purpose of the greater danger exception to target isolation?
A I believe it was to cover -- trying to cover incidents where there may be something so dangerous, that the officer has to fire or, as it says, there is a greater danger to myself if I don't fire, a greater danger to other people, or there is a greater danger to the community at large even though I might not have complete isolation.
Q So in this situation, is it correct that your analysis

was that the threat under these circumstances posed to Officer Zens was greater than the threat that Officer Zens posed to the innocent bystander?

A Yes.

Q Can you please explain that analysis?

A Because in the situation based off of what -- the evidence he had at hand, based off of -- I am sure you also heard earlier in his testimony about how dangerous this was, disregarding commands. He doesn't have to wait, based off his belief -- He doesn't essentially have to get shot or get shot at to confirm this person is turning on him. It fits into the idea of a greater danger to himself at that moment because essentially, it is taking time between life and death.

Q You indicated that there is three different types of greater danger?

A Yes.

Q Which one of those three apply in this situation?

A A greater danger to himself -- meaning Officer Zens -- if he did not fire.

Q So the other two that you explained do not apply in your analysis.

A No.

Q Would you agree with me that the question of whether or not the threat posed to Officer Zens was greater than

the threat that Officer Zens would have posed to the innocent bystander in this situation is a matter of a judgment call of someone who is conducting that analysis?

A Yes.

Q Would you agree with me that in making that judgment call, that sometimes, reasonable minds can differ on their conclusions?

A Yes.

Q And it is clear here that the chief differed in his conclusion than you. Is that right?

A Yes.

Q I am not trying to call you out in front of your superiors or anything, but I am wondering, to the extent that you are an expert in this, are you able to offer an opinion on whether or not that differing opinion in this situation is reasonable or unreasonable?

A Based off what I saw and my report and testimony, the difference, I believe it's unreasonable under the circumstances I saw here.

MR. PEDERSON: All right. I respect that position. Thank you for your statement. One moment, if I can. That is all I have for direct.

MR. KONRAD: Okay. Thank you, Mr. Pederson. It is now 11 minutes after 12:00, so we

will be taking 45 minutes for lunch. Actually, more than that. We will see you at 1:00.

(Lunch break was taken)

MR. KONRAD: I believe, Mr. Matthews, you just gained the floor.

CROSS-EXAMINATION BY MR. MATTHEWS:

Q Sergeant, I want to go back to some of your training. Are you an instructor for DAAT?

A Yes.

Q What is your level of certification?

A Master instructor trainer.

Q Is that the highest you can get?

A Yes.

Q Are you the same for tactical response and firearms?

A Yes.

MR. MATTHEWS: I want to direct your attention to Exhibits 1, 4, and 8. Specifically, Pages 3 of each document.

THE WITNESS: I am ready.

Q The page entitled "Acknowledgements." Right?

A Correct.

Q There is a list of individuals. Right?

A Yes.

Q Your name is on that list. Right?

A Yes, it is.
Q It says you serve on the Tactical Skills Advisory Committee?
A Yes.
Q What is that?
A That is a committee made up of police and training practitioners from around the state that give advice regarding curriculum and training to the Law Enforcement Standards Board for the State of Wisconsin.
Q Is the Law Enforcement Standards Board, the LESB as it is sometimes referred to, responsible for the three exhibits?
A Yes.
Q Those are the training guides?
A Yes.
Q Under the Milwaukee Police Department on the pages there, there are two names listed. Right?
A I will double check because sometimes there is more names. Yes, there are two names.
Q It is yours and James MacGillis. Right?
A Correct.
Q Captain MacGillis?
A Yes.
Q Do you know if he did any work on this case?
A I do not know. I don't think he did.

Q Is he the only one who is also a master instructor trainer?
A It depends what you are asking.
Q Within the police department?
A We have other masters for different disciplines; disciplines of firearms, defensive tactics, vehicle contacts. They have a whole -- somebody can be a master in several different disciplines.
Q Is there anyone else who is a master instructor trainer in firearms within the department?
A Yes. He is the only one.
Q Who?
A Captain MacGillis and I are the only two firearms master instructor trainers.
Q And tactical response, are you two the only master instructor trainers?
A I believe I am the only one left. He used to be. I don't know a hundred percent if he still has a master's status.
Q And on each of the three documents, first looking at Exhibit 8 which is the tactical response, if you scroll down to the middle of the page, it says, "Emeritus (non-voting) Members" there's an individual named "Bob Willis." Do you see that?
A Yes.

Q And then on the other ones, again, non-voting members, Bob Willis and Bob Willis. Do you see those?
A Yes.
Q Do you know Mr. Willis?
A Yes, I do.
Q Is he also a master instructor trainer?
A I believe he established that criteria. I don't believe he is currently. I don't know for sure.
Q But you know him. Right?
A Yes.
Q Fair to say his level of expertise in police procedures is on par with yours?
A Yes. He is the originator of a lot of this material.
Q Do you know, is Sergeant Norberg on the Tactical Skills Advisory Committee?
A No.
Q Is she a DAAT instructor or trainer?
A I don't believe so.
Q Is she a firearms instructor or trainer?
A I don't think so, no.
Q Is she a tactical response instructor or trainer?
A I don't believe so.
Q Fair to say her level of expertise in those areas is far below yours?
A If you are looking at the instructor status, I would say

yes.
Q Is Lieutenant Looney on the Tactical Skills Advisory Committee?
A No.
Q Is Lieutenant Looney a DAAT instructor or trainer?
A I don't believe he is.
Q Is Lieutenant Looney a firearms instructor or trainer?
A He was a firearms instructor, yes. I don't know his status currently.
Q At the top -- If I am understanding you, at the top is master instructor trainer. Right?
A Yes.
Q What is the next level down?
A Instructors.
Q Then what is next?
A I mean, in our department, we have full-time instructors and then we have adjunct instructors. It is not an official category, but a full-time instructor means that is what you do full time.
Q Where would Lieutenant Looney fit on that scale?
A He was an adjunct instructor.
Q Do you know, is he a tactical response instructor or trainer?
A I don't think so. I'd have to look at the records. Sometimes, people are and we don't utilize them all the

time.

Q What about members of the executive command staff? Are any of them master instructor trainers in anything?

A Not to my knowledge.

Q Are the training guides which are Exhibits 1, 4 and 8, are they specific to MPD?

A No.

Q They are used statewide. Right?

A Yes.

Q Are they meant to be specific protocols or provide general guidance?

A Sometimes, they outline requirements, especially when it refers to recruit training. Often, they are minimum standards and they are also guides. We can always have what we call advanced training. We can have our own training and many departments have policies which can exceed or it can -- you just can't go below the limits of what the basic systems put in place.

Q Are uses of force ever pretty?

A No.

Q Are body cameras able to capture everything that an officer sees?

A No.

Q Why not?

A A lot of different factors. Could be the angle where

the camera is pointed, it could be lighting. I have seen some cameras that have infrared capabilities, which, as human beings, we don't have. I have seen cameras fall off and it might not show -- It is an aid, but the officer's testimony, I think, is the critical factor.

Q The officer's perception is always most important. Right?

A Yes.

Q Do you know, the body cams, the ones that the department has, they shoot at 32 frames a second?

A I don't know the exact number of frames per second. I can't say a hundred percent if that is true.

Q When you broke down the video, you looked at them frame by frame, not second by second. Right?

A Yes. There is a way you could stop a frame at a time and click through it.

Q How did you become involved in this case?

A I received a phone call to respond to the shooting scene of the officer-involved shooting was my initial response on the night of the incident.

Q Let me ask a better question. I am sorry for that. You earlier testified that the department wanted your opinion. Do you remember saying that?

A Yes.

Q So with respect to the incident itself and the report that you drafted which is now Exhibit 7, how did you become involved in that portion?
A Um --
Q Let me stop you. You don't normally draft those reports unless asked to. Right?
A Correct.
Q So someone asked you to do that. Right?
A Yes.
Q Who was that?
A Sergeant Norberg.
Q Did she tell you why she wanted you to do that?
A Just part of the investigation for the internal investigation regarding the shooting.
Q Did she tell you that the department wanted your expert opinion?
A She didn't have to say it outright like that, but that's what they do. They want me to render a decision based off of what the case shows and the facts.
Q And, for lack of a better term, that is because you are the guy for firearms. Right?
A Yes.
Q After you issued your report, Exhibit 7, did you do any additional work on this case?
A No.

Q You were asked some questions about metering the corner. Do you remember those questions?
A Yes.
Q I just want to clarify. Metering is not necessarily required. Right?
A No, but in a way, it becomes -- as police officers, it becomes how part of how we do things usually, going around corners.
Q Would you pull up Exhibit 8? Go to Page 17. Do you have it?
A Yes.
Q It is section, "Foot Pursuit Tactics." Right?
A Yes.
Q In that first paragraph, the last line, it says, "Although your tactics will vary depending on the situation and environment, general guidelines include:"
and then it goes into a list. Right?
A Correct.
Q So the manual or the guide specifically says it's just general guidelines. Right?
A Training guidelines, yes.
Q They are not hard and fast rules. Right?
A No.
Q In other words, just because it says that you should

stop, look and listen doesn't mean you have to. Right?
A Depending on the circumstances, correct.
Q These are not requirements; these are guidelines. Right?
A Guidelines for safe operating, yes.
Q But you can safely operate if you go outside the guidelines, too. Right?
A Possibly.
Q You were asked some questions about metering the corner and you don't have anything about it in your report. Right?
A Yes.
Q You reviewed the body cam. You testified to that. Frame by frame. Is it fair to say you didn't put anything in your report about metering the corner because you didn't think there was any issues with that?
A It was something that, as I stated, I didn't clearly see if there was a loss of sight of the individual and based on what I saw, it looked like Officer Zens was relatively close to the suspect, so it looked like he was almost going around the corner almost at the same time, so it didn't rise -- or it didn't -- the concern in my mind wasn't that great at that point.
Q Was it potentially more dangerous for Officer Zens not to go around the corner the way he did?

A If he didn't go around the corner, he would have just stopped. I mean, if he went around the corner slower, you are going to see things at a slower pace and I wouldn't say it is more dangerous. It would just be a different tactic.
Q As part of your role, do you review officers' body cams?
A Yes.
Q Have you reviewed officers in foot pursuits?
A Yes.
Q Have you reviewed officers in foot pursuits losing sight of suspects?
A Yes.
Q Have you recommended that individuals in those instances be disciplined for that?
A I never recommended that.
Q Have you ever forwarded a complaint to Internal Affairs saying, "this officer didn't comply with policy with respect to losing sight of a suspect during a foot pursuit"?
A Not that I can recall. It does come up as a matter of tactics. It can. I can't recall, off the top of my head, if we actually had, you know, what we call a -- to have somebody come in for remediation regarding it, but sometimes, it pops up where we say, "hey, you could have done this better, you could have done that better"

as part of remediation training. Something might come up that way.

MR. MATTHEWS: I want to direct your attention to your report, which is Exhibit 7. Specifically numbered Page 28.

MR. KONRAD: Did you say 23?

MR. MATTHEWS: 28.

MR. COCROFT: Where are we now? Page 28 of what exhibit?

MR. MATTHEWS: Exhibit 7, Commissioner. Sorry.

Q Are you there?

A Yes.

Q On direct, you were asked some questions about what you observed on the video with respect to the suspect's hands. Do you remember that?

A Yes.

Q You testified that that is what you saw, the hands going up. Right?

A Yes.

Q Did you see the hands going up in the motion that made you think that the individual was trying to give up?

A Not that I recall. More outward, hands coming outward.

Q I don't know if you were present. I believe you were because I glanced back and I thought I saw you. But

Commissioner Cocroft asked a couple questions about how the hands of the suspect came out from his shirt at the end of the video before he shot. Were you present for those questions?

A Yes.

Q If you look at the report, the third line down, it says, "Brown turned toward Zens and abruptly extended his arms outward from under his shirt near his waistband."

Do you see that?

A Yes.

Q Is that consistent with what you saw in the animation?

MR. PEDERSON: I don't know if the witness was present for that.

BY MR. MATTHEWS:

Q Were you present for the animation?

A Yes.

Q Is that consistent with what you saw in the animation?

A The animation was different in my mind because it was a lot clearer. I can say that, but it appeared that way, yes.

Q And that is consistent with what you wrote in your report. Right?

A Yes.

Q And you only put truthful and accurate information in

reports. Right?

A Yes.

Q Without getting too far afield, there are three requirements in deadly force situations. Right?

Before you could discharge your weapon.

A More than that.

MR. MATTHEWS: I was trying to make it too simple.

A There are other --

Q Three target requirements.

A Yes. There's target requirements, there is imminent threat criteria and there's --

Q Assuming you meet all the other criteria under the targets, we have target identification. Right?

A Yes.

Q Target acquisition?

A Yes.

Q And target isolation. Right?

A Yes.

Q In this case, did Officer Zens have target identification?

A Yes.

Q Did he have target acquisition?

A Yes.

Q Did he have target isolation?

A Not totally.
Q Not totally. So then he wasn't allowed to fire his weapon. Right?
A There is an exception to target isolation.
Q This is -- The crux of the case is he didn't have target isolation, but there is an exception to target isolation. Is that right?
A Yes, under certain circumstances.
Q In your report, you mention that exception, the greater danger exception. Right?
A Yes.
Q On Page 82 of the DAAT manual and Page 54 of the firearms manual, it says there are three different portions to the greater danger exception. Right?
A Yes.
Q Danger to self, danger to others and danger to the community at large. Right?
A Yes.
Q You said the greater danger exception applies because the danger to self -- meaning Officer Zens -- was greater than the need to have target isolation. Right?
A Yes.
Q And that was your professional opinion as the master instructor trainer of the Milwaukee Police Department.
A Yes.

Q Did anything that you learned during your investigation lead you to believe that Officer Zens was untruthful?
A No. I went off the reports and the video footage.
Q Did anything that you saw or read or learned about during your investigation lead you to believe that Officer Zens' perceptions of what happened at the time he discharged his weapon were unreasonable?
A No.
Q Did Officer Zens have any other option than to discharge his weapon at the time that he did?
A At that moment in time, based off the dynamics of the situation, what I took from his statement and belief, I'd say no.
Q Just to clarify this. You are the department expert on tactical response. Right?
A Yes.
Q You saw no issue with failing to meter the corner. Right?
A It did not jump out at me, no. As I said before, I thought he had sight of him during his foot pursuit and even if he lost it for a moment, he was going around the corner at a -- he was in close proximity to the subject, so he was almost -- the amount of time he would not have saw him is minimal, so it didn't rise to my -- it didn't rise up as a major issue to me.

Q When you are doing a use of force analysis, you are guided by Graham v. Connor. Right?
A Yes.
Q And Graham v. Connor specifically says that you are not supposed to Monday morning quarterback. Right?
A I believe it talks about 20/20 hindsight.
Q What does that mean?
A Having clarity afterwards. Being able to see things in a factual manner and going back to those facts based off of a real situation.
Q Is the point of that case to say that even if an officer's perception at the time turns out to be wrong later on, that doesn't make them a violation. Right? Or unlawful.
A Correct.
Q You were asked a question by Attorney Pederson about target isolation and he read you a part of the definition of target isolation and he said, "so did Officer Zens have target isolation" and you said "no." Do you remember that?
A Yes.
Q But when you said "no," you weren't asked the full scope of the question. Right?
A In that limited part of it, correct.
Q In other words, just because he didn't have target

isolation doesn't mean that the exception didn't apply. Right?

A Yes.

Q I think you testified that you respond to every critical that you can. Right?

A Yes.

Q And approximately how many have you responded to?

A Since taking my position, I'd have to estimate. It is not a hard number.

Q I am looking for an estimation.

A An estimation, 40 to 50 since I have taken this position and I did some -- previous to being a range master when I was assigned to the academy as an officer, the previous range master used me as -- to go in his position when he couldn't make it for whatever reason.

Q So we are talking 50-plus. Have you also responded to criticals for other agencies?

A No, not that I can recall.

Q Even if the situation is not considered a critical under the SOP, say, for example, an officer discharges their weapon, are you still called out to analyze that situation?

A Sometimes I am, sometimes I am not.

Q Would that increase the number -- the 50 number as higher?

A Yes. Sometimes I get called out when somebody is not shot. It just depends on what the night inspector or command wants at a scene.
Q So adding that number, those situations where an officer shoots but doesn't hit someone, how many would that total?
A It might add another 15, 20 on top of that. I am just estimating.
Q So 65 to 70 total incidents. Right?
A Yes.
Q It is a ballpark.
A Yes.
Q And of those 65 to 70, you just said 15 to 20 involved officers who didn't even hit anything. Right?
A Potentially, yes.
Q Out of those 65 to 70, how many times did officers shoot just once?
A I don't have a hard number. It is a lower number, potentially lower.
Q Less than five?
A I am going to go with a good estimate, say, five to ten.
Q Are you familiar with how often officers involved in those situations actually hit the intended target?
A There is varying research on that. I have a general idea in our department of the hit ratio.

Q Hit ratio. What is the hit ratio of the Milwaukee Police Department?
A I don't have a hard number on that. It is not an official set of data. It is something that we go off of. As a general idea of, you know, we like to see a high hit ratio, as anybody would. That means that the officer is intending a certain person to justify the shoot to be hit by gunfire. That is a good thing. A low hit ratio means that the potential for more, you know, liability and danger to everybody else is increased.
Q But the number is a low hit ratio. Right?
A Our department consistently was usually high.
Q What do you mean by "high"?
A At times, we had 70 to 80 percent hit ratios.
Q And --
A I am not saying that was a hard, statistical analysis. That was based off of a generality of looking at the incidents and understanding potentially how many rounds were fired and how many hit the individual. Often, that is fluid in the investigation. When I go to the scene, we don't always know in the early hours of an investigation how many rounds were fired and often, when an individual goes for medical treatment, you, kind of -- You know, there is different ways. Maybe, depending

on injuries and the wounds, you don't know a hundred percent, but it, kind of, gives you an idea of how many rounds struck a person.

Q Does the hit ratio decline as the night gets darker?

A It all depends on the circumstances. I mean, I don't know you can say as a general idea. I mean, I think -- There is a lot of reasons why you might have a low hit ratio. That is why we don't have a hard-and-fast number on this. It's a general guide.

Q Have you ever seen an officer who has discharged multiple rounds, hit every single round at their target?

A Yes.

Q How often does that happen?

A It is usually, you know, statistical. As you might know, it's a normal bell curve, the lower end of the curve. A hundred percent hit ratio is usually toward the lower end. It is not unheard of.

Q So out of those 65 to 70, we have already eliminated 15 to 20 and out of the 50, are we talking five that they hit every target?

A Another five to ten. That is a rough guess.

Q So we are at 65 to 70 total minus five to ten. That leaves us at 55 to 60 for an officer who misses when they fire. Right?

A This is when they fire, it sounds, you know, like, they

are missing a complete target. That's not always the case. Sometimes, because shooting incidents are dynamic and people don't stand still, they are turning, twisting, falling or there is movement involved, so that could be anywhere from one miss to multiple misses.

Q We only have one miss here, though. Right?

A Yes.

Q One out of one, but in cases -- What I am getting at is, most of the time, police officers, whether with Milwaukee Police Department or elsewhere, discharge their weapon, they miss at some point. Right?

A The potential is high. Because of the high stress and the dynamic situations, there is more factors than that, but --

Q And you -- you can miss even when you have target isolation. Right?

A Yes.

MR. MATTHEWS: That is all I have.

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: Thank you.

REDIRECT EXAMINATION BY MR. PEDERSON:

Q With this discussion of hit ratios and all of that and the possibility for an officer to miss, isn't that all the more reason why an officer should stick to the training and have target isolation?

A It is, I would say, a fact which would make officers take their training to heart and practice as much as they can.
Q Sure. But my point is, isn't the requirement or the general requirement of target isolation attempting to address these kinds of issues, like, you might miss?
A Yes.
Q Okay. Would you agree with me that metering is, essentially, a fundamental tool to law enforcement officers out in the field?
A Yes.
Q So even though it is optional and there is different ways to use it, it is really a core principle of how officers perform their duties in the field. Right?
A Yes.
Q One of the reasons why it is such a good idea is that metering, when appropriate, can provide an officer time, distance and cover. Right?
A It can.
Q All right. Certainly, if Officer Zens had metered here, there would definitely have been more distance between him and the person he was pursuing. Right?
A Yes.
Q He potentially could have had cover, you know, depending on how the dynamics went because he could go back around

the corner. Right? That is one of the reasons why you go around slowly. Is that right?

A Yes.

Q Okay. In terms of time, I don't know if that could affect the time, but is there a situation where the time factor can be affected by proper metering?

A If the person doubles back and is standing right at the edge of the corner, it is going to be a matter of bang bang, who shoots first.

Q Well, another factor of time is time and distance are often strongly correlated. Right?

A Yes.

Q The shorter the distance between you and the bad actor or someone who is threatening you, the more -- the less time you have to react or to do -- to take appropriate action. Right?

A Yes.

Q So, in a sense, making sure you have good distance can, in a sense, increase your time factor or your reaction time.

A Yes.

Q Very good. Mr. Matthews reviewed a portion of your testimony with me where I read the definition of target isolation and asked you in this instance if there was target isolation and at the time that I asked you, you

said no. Do you recall that?

A Yes.

Q Mr. Matthews then asked you, essentially, the same thing and, if I am correct, my notes here indicate that your response to him was, "not totally," that he did not have totally have target isolation. Do you remember testifying to that?

A Yes.

Q So can you please explain to me what the difference is between your answer to me where the answer was "no" and the answer to him was "not totally"? Can you reconcile that?

A It's a matter of semantics. I said it, but in my mind thinking, he has an actor right in front of him and there is somebody potentially behind that person. It may be totally covered by the individual in front of you.

Q Well, in this situation, there is no doubt there was a person who was very significantly within the line of fire, so to speak. Is that correct?

A Yes.

Q All right. Also, when it comes to the analysis, you don't get to the greater danger question -- the greater danger exception issue if you don't first determine that there is not target isolation. Right?

A That is basically how we make an exception to have an isolation under certain circumstances.
Q Sure. Well, let me restate the question. Maybe I can state it differently. If, in your analysis, you decide that an officer has target acquisition, they have target identification and they have target isolation. In that situation, there'd be no reason to go to the next step of asking whether or not there is a greater danger exception. Right?
A Correct.
Q So the only reason you ever do a greater danger exception is if an officer shoots in a situation where he does not have target isolation. Right?
A Yes.
Q As we previously discussed, one of the central questions that was before the chief and is now before the commissioners is that judgment call of whether or not the greater danger exception should apply. Do you understand that?
A Yes.
Q All right. Do you have to be a master instructor in order to make that judgment call?
A No.
Q Okay. Does the chief utilize your expertise as a master instructor to assist him in making that judgment call?

A I believe he would. That is why I am here.
Q Right. So in the end, even though you are a master instructor, it isn't your job to make that final call. That is up to the chief and the FPC. Is that right? That is your understanding of your role?
A Yes.
MR. PEDERSON: Okay. That is all I have. Thank you.
MR. KONRAD: Mr. Matthews?
MR. MATTHEWS: Just a couple questions.
RECROSS-EXAMINATION BY MR. MATTHEWS:
Q We keep throwing around the isolation issue. Right? Target isolation. What is meant by "isolation"?
A My understanding -- I am trying to recall from the training materials -- that the target is not in close proximity and near other potentially innocent people.
Q If I have a gun and I am looking at you, even though there are other people in the room, do I have target isolation on you?
A Yes.
Q Even though there are other people around.
MR. COCROFT: We missed that part.
MR. MATTHEWS: I said if I have a gun and I am pointing it at Sergeant Groszczyk, do I

have target isolation on him and he said yes.

A This line of sight here, this also depends on what these people -- if they started moving, that changes the dynamics.

Q So how -- how close does someone else have to be where you don't have -- Strike that. My next question was going to be, is there a difference between full target isolation and partial target isolation?

A There be could. I mean, there is times you might have an obstructed target and now, we are getting into a greater danger exception because -- I train that extensively. We train that your target is not totally isolated all the time. You may have to take a shot if somebody else is nearby, so you might have a partially obscured target or a target that has someone in close proximity to them. That would fit the under the exception to target isolation.

Q You were asked a question about sticking to training and having target isolation. Do you remember that question?

A Sure, I am trying to. There was a whole bunch of them about target isolation. There is a lot of different angles here.

Q So the question was, should an officer stick to their training and have target isolation? Do you remember

that?

A Yes.

Q Officers aren't specifically trained that they have to have target isolation. Right?

A Based off of circumstances, we might not -- you might have to shoot when we don't have target isolation, yes.

Q So you can stick to your training and not have target isolation is the point.

A Yes.

MR. MATTHEWS: That is all I have.

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: I don't want to belabor the point, but I feel I need to respond to clarify.

MR. KONRAD: If you don't want to belabor it, you don't have to.

MR. PEDERSON: Very well. I will let it go. Thank you.

MR. KONRAD: I didn't mean to stop you.

RE-REDIRECT EXAMINATION BY MR. PEDERSON:

Q Target isolation is the third factor in target require-ments. Right?

A Yes.

Q It is a target requirement.

A Yes.
Q Except that if the greater danger exception applies, then that requirement is waived in terms of the exception. Right?
A Yes.
Q So at no point is an officer able to just disregard the issue of target isolation.
A No.
MR. PEDERSON: That is all.
MR. KONRAD: Commissioners, do you have any questions?
MS. MC KENZIE: I have one. It sounds as if even within the training, there is some -- a modicum of discretion that is allowed the officer. Is that correct?
THE WITNESS: Yes.
MR. KONRAD: Commissioners Cocroft or Crouther, any questions?
MR. COCROFT: I have a question. Is it your expert opinion that by not metering the corner, Officer Zens then found himself outnumbered or possibly ambushed, do you believe being outnumbered could have compelled him to shoot?
THE WITNESS: Can you clarify the question? If he wouldn't have metered the corner, would

he have found himself outnumbered? Is that what you are asking?

MR. COCROFT: It was his testimony that when he rounded the corner, he found himself outnumbered. Had he metered the corner, he may not have found himself outnumbered. So by being surprised there were two people there, that's, kind of, like an ambush and do you feel that he considered that the reason why he was compelled to shoot, because he thought he was outnumbered or ambushed?

THE WITNESS: If he would have stayed at the corner -- The idea of metering, like I said earlier, there is different forms it takes. There is what we call slow, methodical metering, which is take your time, slow down. Then there's dynamic, which I go faster. I am still metering the corner taking information while I go around the corner at a higher rate of speed based off exigency or urgency. However, if he stayed at the corner, I can't speculate how he would have been confronted. There was two people there. What they would have done after that, I can't clearly say. He had one person that was, you know, endangering the public and officers and the other idea is he may have endangered people in that house. I don't know if he was trying to break in or something like that. The other

thing is, if you let somebody break into the house, we have a more serious situation on our hands besides just fleeing. Does that, kind of, clarify it, sir?

MR. COCROFT: Yes, one angle. The other angle is that it's stated in the manual that one of the reasons for metering the corner is so that you wouldn't run into an ambush. That is, kind of, why I stuck to it, but you, kind of, satisfied my -- you satisfied my question with your answer. The other question I had, this came up a lot about, you know, the hit ratio and everything and how he only shot one time. Could it be that he realized that he shot an innocent person and that is why he stopped shooting and they both went down?

THE WITNESS: I am not going to speculate what Officer Zens thought. I don't know what he was thinking, but based off what I saw, the report stated that after he fired one shot, he saw the man's hands, so he stopped firing. So it is very -- a quick unfolding situation where it's bang and all of a sudden, he sees the man's hands and he doesn't fire anymore. So I think it shows a level of restraint.

MR. COCROFT: Thank you.

MR. KONRAD: Mr. Matthews?

MR. MATTHEWS: Just some follow-up

on Commissioner's Cocroft's questions.

RE-RECROSS-EXAMINATION BY MR. MATTHEWS:

Q Do you know, based on your role in this, did Officer Zens shoot because he saw two people?

A Based off of what I read and the facts, it doesn't state that.

Q Did he discharge his weapon right after he rounded the corner?

A No.

Q Did he wait to shoot until Brown moved his hands in a shooting motion? Right?

A Yes.

Q I mean, that's what you put in the report. I'm just asking. I just want to make sure. I think we need to make it clear that he didn't just round the corner and then start firing because he saw two people. Right?

A No. He was closing the gap, we call it, and closing the distance on the individual to take him into custody and then there was this quick turn. Once he rounded the corner, no, there was not immediate gunfire.

MR. MATTHEWS: That is all I have.

MR. PEDERSON: No follow-up.

MR. KONRAD: Any further questions from the commissioners?

MS. MC KENZIE: None.

MR. KONRAD: All right. Thank you.

MR. COCROFT: This is Cocroft.

MR. KONRAD: Excuse me.

MR. COCROFT: I only brought it up because in his testimony, he said that he felt threatened as far as he was outnumbered. That is my recollection. I'd have to go back and check my notes again, but I was pretty certain that is what he said.

MR. MATTHEWS: I think you are correct.

MR. KONRAD: All right. Thank you.

(Witness excused)

MR. PEDERSON: I would next call Sergeant Norberg.

VYNETTA NORBERG, having been first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth testified as follows:

MR. KONRAD: The witness is sworn.

MR. PEDERSON: Thank you.

DIRECT EXAMINATION BY MR. PEDERSON:

Q Would you please state your name for the record?

A Vynetta Norberg. Sergeant Vynetta Norberg.

Q Are you a sworn member of the Milwaukee Police Depart-

ment?
A Yes.
Q How long have you been with the Milwaukee Police Department?
A I just finished my 19th year.
Q What is your current rank?
A Sergeant.
Q How long have you been a sergeant?
A Since 2015.
Q Where are you currently assigned as a sergeant?
A Internal Affairs.
Q How long have you been at Internal Affairs?
A 2017.
Q What do you do with Internal Affairs?
A Currently, I am an investigator going over to do some admin duties.
Q Very good. Were you assigned to investigate the underlying case appealed by Officer Zens?
A Yes.
Q Did you conduct that investigation?
A Yes.
Q Did you prepare a memo summarizing your investigation?
A Yes.
(A document was marked as Exhibit 9)
Q There should be a document in front of you marked as

No. 9. Are you able to identify that document for me?

A Yes.

Q What is it?

A It is 22 pages of the investigation that I conducted.

MR. MATTHEWS: I would just like to ask a clarifying question. I understand it is out of order. This document starting on Page 19, I believe, all of a sudden is listed as 23 pages whereas, before that, it said it is 22 pages. This is the only version of the report that I have seen.

MR. KONRAD: How do you get the 19? Are you counting the pages?

MR. MATTHEWS: Bates No. 19 which is Page 57.

MR. PEDERSON: At the bottom left, it begins --

MR. KONRAD: It shows 23.

MR. MATTHEWS: She said it is a 22-page report. On my report, it says 23. I never counted it because I don't know that it really matters, but this is the only version I ever got.

MR. KONRAD: We can ask the witness to look at it and let us know if it is complete?

MR. PEDERSON: Sure.

BY MR. PEDERSON:

Q Do you understand the issue here, Sergeant Norberg, and the numbering?
A Yes. It is Page 19 of 23. It may be a double number. Can you tell me what is the issue with it?
Q I will direct your attention. Can you get to the 18 of 22? You see on the bottom left hand where it says "18 of 22"?
A Yes.
Q If you flip to the next page, you'd expect it to say "19 of 22," but it says "19 of 23."
A I see.
Q So I am wondering, is that just a typo in the numbering or is this, despite the numbering, a full representation of your memo? Is there anything missing?
A Despite the numbering, it is a full representation of the investigation.

MR. MATTHEWS: Just to clarify again, she testified it is a 22-page report. It is a 23-page report. Right?

MR. KONRAD: It says 23 or 22?

MR. MATTHEWS: I counted 23.

BY MR. PEDERSON:
Q You previously indicated it was a 22-page report. Having taken a chance to look at this, do you have a different statement as regards to the number of pages of

this report?

A I literally would have to count the pages to see --

MR. PEDERSON: Please do.

A I show 23 pages.

Q Very good. The next question for you is --

MR. KONRAD: What was her answer?

Q 23 pages, I believe. Was that the testimony?

A Yes, 23 pages.

Q Very good. Could you please summarize for the commissioners what you -- how you started your investigation?

A Basically, I gathered all the reports I was -- excuse me, given the reports or the folder to investigate by a lieutenant. I gathered any reports that I could find on my own. Then I contacted our Criminal Investigation Bureau to gather anymore reports that I did not have at the time.

Q Among the reports, did you review any computer-aided dispatch reports?

A Yes.

Q Did you review the Use of Force report?

A Yes.

Q Did you review the other reports filed by other officers in this matter?

A Yes.

Q Are you able to estimate how many reports you might have

reviewed?

A I'd say 20 to 30 reports.

Q I direct your attention to Page 3 of the report. Near the top, it says "Interview of Police Officer Chad Boyack." Do you see that?

A Yes.

Q Okay. Did you, yourself, interview that officer or did you review something else?

A No, I reviewed a supplemental report which was done by a detective that evening of the incident.

Q You read the report of someone who interviewed that officer.

A Yes.

Q Then you summarized your findings there of what you found in the report?

A Yes.

Q On the next page, it indicates you had an interview regarding the interview of Officer Parks. Is that the same there?

A Yes.

Q Page 6, it indicates "Interview of Mrs. Russ." Was that also a review of her report?

A Yes.

Q At the bottom of that page, "Interview of vehicle owner"?

A Yes.
Q And on the next page, it indicates another interview. Is that you also reviewing the report?
A Yes.
Q On the next page, we start a "Hospital Summary." What is contained in this summary?
A It is the disposition of the -- or supplemental of the detective who went to the hospital to interview medical personnel that may have been on the scene during the incident or after the incident.
Q On Page 9, it indicates the body worn camera of Officer Zens. Did you review that body worn camera footage yourself?
A Yes.
Q Did you generate the portions here where it is time stamped based on your findings of your review of it?
A Yes. Along with some other supplemental reports, yes, I reviewed it.
Q Very good. Page 10 indicates a body worn camera of Parks. Did you, yourself, again review that personally?
A Yes.
Q You watched that video and indicated these times based on your own observations?
A Yes.
Q Next, you indicate that you reviewed the vehicle pursuit

recording. Is that correct?
A Yes.
Q Did you do the same thing regarding that recording?
A Yes.
Q Next, you reviewed a report of Tari Davis. Is that correct?
A Yes.
Q Your report continues on and you continue to indicate that you reviewed and summarized the contents of further interviews and reports. Is that right?
A Yes.
Q At any point, did you actually conduct any interviews yourself?
A No, not of those people within the report, no.
Q Go forward to Page 15. There, it indicates interview of Police Officer Zens with his attorney. What sort of interview was this that you reviewed?
A This was a supplemental interview which was conducted by two Milwaukee police detectives after the date of the incident.
Q Your report goes on for about two and a half pages regarding your summary of that report conducted by those detectives. Is that right?
A Yes.
Q That interview. Then on Page 17, it indicates you

actually conducted a PI-21 interview yourself of Officer Zens. Is that right?

A Yes.

Q Have you heard Officer Zens' testimony today?

A Yes.

Q Has the testimony he provided been consistent with what he told you in the PI-21?

A I believe so.

Q Has it been consistent with what you summarized and indicated what he told the detectives?

A Yes.

Q Is there anything else you did further in your investigation that you summarized here?

A If you go further into the next pages, there are some summaries of Sergeant Groszczyk.

Q Let me direct you. At Page 20, we have it appears to be a summary of the relevant SOPs and manual training information. Is that right?

A Yes.

Q Page 21, you include the opinion of Sergeant Groszczyk and his analysis. Is that right?

A Yes.

Q And finally, on the final page, you include reference to the district attorney letter that was issued indicating that Officer Zens would not be charged. Is that right?

A Yes.
Q All right. Does that include all the major components of the investigation that you conducted?
A Yes.
Q Did you truthfully and accurately represent, to the best of your ability, the facts that you found in this memo?
A Yes.
Q Is there anything, as you sit here today, that you believe you need to add in terms of fully informing the commissioners of the investigation you conducted?
A No, not at the moment.

MR. PEDERSON: That is all I have.

MR. KONRAD: Mr. Matthews?

CROSS-EXAMINATION BY MR. MATTHEWS:

Q Sergeant, how many investigations have you conducted at Internal Affairs?
A Probably over 40 to 50.
Q This wasn't your first investigation. Right?
A No.
Q Members of Internal Affairs are bound by the Code of Conduct. Right?
A Yes.
Q They are bound by the SOPs, too. Right?
A Yes.
Q That includes you. Right?

A Yes.
Q You are familiar with all MPD SOPs. Right?
A I'm sorry. Familiar with what?
Q All MPD SOPs. Right?
A I have some familiarity with them, yes.
Q Would you agree with me that some contain specific protocols and others contain general guidance?
A Yes.
Q For example, a specific protocol is how to call in sick or file for FMLA. Right?
A Yes.
Q And more general guidances for something like a citizen encounter, what you should say and how to say it, things like that. Typically, 085 is the one I am referencing.
A Is there anything specifically in 085? You said "general guidelines."
Q General guidance. In other words, sometimes, they are specific instructions; sometimes, they are general guidance. Right?
A Yes.
Q You are familiar with SOP 450. Right?
A Yes.
Q Which one is that?
A 450 is personnel investigations.
(A document was marked as Exhibit 10)

Q You have what's been marked as Exhibit 10. Right?
A Yes.
Q That is a copy of MPD SOP 450. Right?
A Yes.
Q Entitled "Personnel Investigations"?
A Yes.
Q Effective June 21, 2019?
A Yes.
Q It says, down in the first paragraph, that the purpose is to communicate the proper procedures to follow regarding personnel investigations. Right?
A Yes.
Q You'd agree with me that 450 provides the procedural framework for internal investigations?
A Yes.
Q We are here because of the internal investigation of Officer Zens. Right?
A Yes.
Q And that, as a member of Internal Affairs, you are bound by the terms of 450. Right?
A Yes.
Q As the investigator in this case, your job is to gather the facts. Right?
A Yes.
Q The good and the bad. Right?

A Yes.
Q Not to give opinions, though. Right?
A Correct.
Q And you are supposed to put the facts in your report. Right?
A Yes.
Q And that is Exhibit 7 -- Exhibit 9. Right?
A Correct.
Q That is called the "Investigator's Summary Report." Right?
A Yes.
Q If you look at Exhibit 10, on Page 11 -- I know I am throwing a bunch of numbers at you -- Exhibit 10, Page 11, up at the top, it says "H. Investigator's Summary Report." Right?
A Yes.
Q That is your Exhibit 9. Right?
A Yes. I am sorry. You said "H"?
Q Yes. "H" is Exhibit 9. Right?
A Yes.
Q If you look at H Sub 3, it says what is supposed to be in your report. Right?
A Yes.
Q At the end of the second line down, it says, "All information contained within this section

must be supported by other documents/evidence within the investigative file."

Do you see that?

A Yes.

Q It also says,

"Additionally, if an investigator makes reference to facts contained in a document (such as a PD-2, line-up, subpoena), then that document or a copy of that document should be included within the investigative file."

Do you see that?

A Yes.

Q Now, in your report, which is Exhibit 9, you reference the firearms manual, the DAAT manual and I believe the Tactical Response Guide. Do you remember that?

A Yes.

Q You refer to them explicitly. Right?

A Yes.

Q Starting on numbered Page 58 -- or Bates 58, numbered Page 20, toward the bottom -- or starting at the middle, it says, "Referenced Training Material." Do you see that? It's right under "Mr. Kevin BROWN'S HISTORY"?

A Yes.

Q It says you reference the firearms guide, and then you reference the Tactical Response Guide. Right?

A Yes.
Q Did you attach those documents to the report?
A I am not sure if I did or didn't attach those.
Q You said you have done 40 or 50 investigations at Internal Affairs. Right?
A Normally, I would have attached them to that or along with my paperwork after it was turned over.
Q Do you know if any copies of those documents were provided to Officer Zens when he was discharged?
A I don't know. I didn't serve him the paperwork.
Q You'd agree with me that because you reference them in your report, they should have been attached to your report.
A Yes, at some point.
Q You do that also because that is good policing. Right?
A Yes, sure.
Q That is consistent with the Code of Conduct. Right?
A Sure.
(A document was marked as Exhibit 11)
Q You have in front of you what's been marked as Exhibit 11.
A Yes.
Q You have seen it before?
A Yes.
Q What is it?

A It is the Milwaukee Police Department Code of Conduct, a copy of the booklet.
Q I specifically want to direct your attention to 1.04 on Page 4. The second sentence reads,
"Investigations shall be conducted and reports shall be prepared in a prompt, thorough, impartial and careful manner so as to ensure accountability and responsibility in accordance with the law."
That is what it says. Right?
A Yes.
Q You complied with that mandate with respect to your investigation here. Right?
A Yes, I believe so.
Q So anytime you reference a fact from another document in your report, you attach that document or a copy to it to your report. Right?
A Yes. I would include that where the information came from, yes.
Q So if that information was never turned over to Officer Zens, that didn't come from you. Right?
A As far as presenting him with this discharge.
Q On Page 6 (sic) of the Code of Conduct, Guiding Principle 3.11, it says,
"Department members are required to be complete, honest and accurate with respect to all

relevant facts and information pertaining to any criminal or civil session investigation, report or inquiry."

Do you see that?

A Yes.

Q So you'd agree with me that in order for your to comply with that Guiding Principle 3.11, it must be complete, honest and accurate with respect to all relevant facts and information. Right?

A Yes.

Q Are you familiar with Officer Zens?

A Yes, I am.

Q How so?

A When I received the investigation for his incident, that is how I became familiar with him.

Q So you didn't know him before the incident?

A I did not.

Q Who assigned the investigation to you?

A At that time, I believe it would have been lieutenant, now-Captain Feldmeier.

Q I am sorry. I didn't hear that.

A At that time I received the assignment, it would have been lieutenant, now-Captain Feldmeier.

Q Captain Feldmeier?

A Correct.

Q Whenever you get an assignment for a case, you do an initiation memo. Right?
A Yes.
Q That is required in SOP 450. Right?
A Yes.
(A document was marked as Exhibit 12)
Q Showing you what's been marked as Exhibit 12, have you seen that document before?
A Yes.
Q What is it?
A This is the initiation for the incident on the sixth.
Q It looks like Captain Kavanaugh instructed you to do an investigation?
A At some point through Captain Feldmeier.
Q Just so I can understand your testimony, you believe that Captain Feldmeier told you directly, but officially, that had to come from Captain Kavanaugh?
A No. It says "instructed members of the Internal Affairs Division."
Q Captain Kavanaugh didn't instruct you directly. You were instructed directly by Captain Feldmeier. Is that correct?
A That is correct.
Q What were you tasked with investigating?
A Basically, to conduct an administrative review of this

critical incident involving Officer Zens.

Q Is that referenced in Core Value 6.00, Guiding Principle 6.01?

A Yes. Administrative review, yes.

Q Do you know if Officer Zens was charged with a violation of that core value and guiding principle?

A 6.00? No.

Q 6.01?

A No.

Q So neither of them. Right?

A No.

Q Did you -- did you make any conclusions on those?

A I believe that through the lieutenant's cover, there was a conclusion on there.

Q That he was exonerated?

A Correct.

MR. KONRAD: I think we are going to take a ten-minute break now until 2:30. We have had a request for one.

MR. COCROFT: Chair, I just wanted to hear that last part about the exoneration. It came through muffled.

MR. KONRAD: I think maybe when we come back, you could back up on this line of questioning and do it over again. I think that will be helpful.

MR. COCROFT: I appreciate it.

MR. MATTHEWS: Sure.

MR. KONRAD: We will be back here at 2:30.

(Discussion off the record)

MR. KONRAD: Back on the record. You were asking the witness to undertake an investigation to determine whether or not the Code of Conduct which requires officers to not use any more force than necessary was violated. Is that correct?

MR. MATTHEWS: Correct.

MR. KONRAD: Take it from there.

MR. MATTHEWS: Sure.

BY MR. MATTHEWS:

Q You were tasked initially with investigating 6.00, 6.01. Right?

A Yes.

Q Just because that's the original task doesn't mean the investigation can't go in different directions. Right?

A That is correct, yes.

Q That specifically is stated in SOP 450. Right?

A Yes.

Q You did an investigation of 6.00, 6.01 and eventually, the lieutenant concluded that Officer Zens was exonerated on that charge. Right?

A Yes.
Q That investigation. Right?
A Yes, that allegation.
Q Do you mention 6.00, 6.01 anywhere in your investigative summary report?
A Not that I know of, unless you --
Q I didn't see it anywhere, but I am asking you.
A That is correct.
Q Is it fair to say that Exhibit 9, which is the Investigator's Summary Report, is the only actual report you drafted in this case? Right?
A There was the initiation report as well.
Q So Exhibit 12, the one we were just talking about --
(A document was marked as Exhibit 13)
MR. MATTHEWS: There's a live witness being counseled by a court officer.
MR. KONRAD: You should refrain from doing that.
MR. MATTHEWS: I'd like to know what the discussion was.
MR. KONRAD: Pardon me?
MR. MATTHEWS: I'd like to know what the discussion was.
THE WITNESS: We didn't have a discussion.

MR. FELLERS: I didn't say anything.

MR. MATTHEWS: What were you --

MR. FELLERS: I didn't say anything to her. I handed it to her.

MR. MATTHEWS: So what was the point of going over there and pointing at whatever you were pointing?

MR. FELLERS: She showed me a memorandum and it lacked a signature. I went up to look. That is all.

MR. MATTHEWS: All right.

BY MR. MATTHEWS:

Q Sergeant, you have been shown a document that's been marked as Exhibit 13. Have you seen that document before?

A Yes.

Q What is it?

A This is the Response to Charges memo.

Q We've got -- Exhibit 9, Exhibit 12 and Exhibit 13 are documents created by you in this case. Right?

A Yes.

Q Did you create any other documents?

A Not that I can recall at this moment.

Q Looking at Exhibit 12 dated September 12, 2019, that is

the initiation report. Right?

A Yes.

Q And that is the date you started the investigation. Right?

A That is correct.

Q Then Exhibit 13 is your conclusion summary, or conclusion report. Right?

A No. 13 is --

Q The Response to Charges to --

A Yes.

Q Was that the last thing you did in this case?

A At this point, that I can recall, yes.

Q That is dated July 27, 2020. Right?

A That is correct.

Q Are you a firearms instructor or trainer?

A No, I am not.

Q Are you a DAAT instructor or trainer?

A No, I am not.

Q Are you a tactical response instructor or trainer?

A No, I am not.

Q Have you ever served in any of those capacities?

A No. As a trainer, no.

Q It fair to say you don't have any specific expertise in those fields?

A In those three, yes.

Q Have you ever been in a foot pursuit?
A Yes.
Q About how many?
A Not many. I'd say less than ten.
Q When was the last time you were in a foot pursuit?
A Somewhere when I was an officer on patrol that I can recall.
Q Five years ago? Ten years ago?
A More than five years ago. Probably almost more than -- I don't think more than ten years ago.
Q Did you ever lose sight of a person you were chasing?
A Sure.
Q It happens all the time. Right?
A I can't say it happens all the time, but it has happened to me.
Q Would you say out of the ten or so chases you've done, has it happened one time? Two times? Three times? How many times?
A At least once that I can recall.
Q Did you stop immediately?
A I don't recall if I stopped or not.
Q If you didn't stop immediately, did you get disciplined?
A I don't recall.
Q Have you ever been disciplined for not stopping your foot pursuit?

A No.
Q Have you ever been disciplined for not metering?
A No.
Q You never worked on the street as a police officer with a body camera. Right?
A No.
Q When was the last time you worked on the street as an officer?
A Patrol? I would say 2014, but then I went to other assignments.
Q Working as an officer.
A 2015.
Q Would you agree with me that the language in Exhibit 13 is boilerplate language?
A I am sorry. Repeat that.
Q Exhibit 13, the report you did after Officer Zens responded to charges, would you agree with me that that language in your report is just boilerplate language?
A Can you tell me what you mean by "boilerplate"?
Q Just a standard response from Internal Affairs for every time someone responds to charges.
A I can say pretty much so if there is no new information provided, yes.
Q If I make an offer of proof that I've looked at hundreds of Internal Affairs investigations and I think I have

seen language other than that one time, would that be consistent with your experience as well?

A Yes, for most of the responses.

Q Turning to your primary report, Exhibit 9, you were asked a variety of questions on this report from Attorney Pederson. Right?

A Yes.

Q Going through what you actually did in this case, you interviewed Officer Zens pursuant to a PI-21. Right?

A Yes.

Q And you looked at the manuals. Right?

A I did, yes.

Q And did you interview anybody else yourself?

A No.

Q I want to direct your attention to Page 9 of your report which is Bates marked 47. Are you there?

A Yes.

Q Attorney Pederson asked you a question whether you reviewed the body cam. Right?

A Yes.

Q Then you testified that you did and that you broke it down. Do you remember saying that?

A I am not recalling if I said I broke it down or not, but I reviewed the body cam.

Q In the section we are looking at right now, there is

numbers and explanations. Do you see that?
A Yes.
Q Did you copy and paste that from somewhere else?
A No, I didn't copy and paste.
Q So those are your own times and your own statements?
A The times were consistent with what I viewed for the reports or audio that I had.
Q If we pull Tri-Tech Supplement No. 192510014.26, the language on Page 47 -- Bates 47 would be different than the language here.
A I am sorry. Repeat what you said. The language --
Q You just said you wrote these statements on Page 47. Right?
A Yes. You asked me if I copied and pasted. I did not.
Q So then I asked you, because it says, "I reviewed Tri-Tech Supplement 92510014.26 which was documented by Police Detective Jeffrey Emanuelson." Right?
A Yes.
Q What I was asking is, by pulling Emanuelson's report -- or his supp, are the words going to match what you wrote?
A Yes, probably.
Q You didn't copy and paste, but the words are going to match.
A You asked me if I copied or pasted. I didn't copy or

paste. I wrote it down, I looked at the actual supplement and examined what was said and the times were consistent.

Q That is not what I am asking. So you copied what Emanuelson said -- what Emanuelson wrote.

A Sure, yes.

Q In fact, if you go over every single person's statement in your report minus the PI-21 and the reference to the training protocols, everything else is the exact same type of scenario; it is just copied from someone else. Right?

A Correct.

Q So what actual investigation did you do?

A Looking over those reports, examining video -- examining lots of video, I should say, and reviewing the reports.

Q Let me stop you there. You examined the video, but you didn't write anything down about your examination. Right?

A Because the examination of the video was consistent with what someone had already written.

Q You'd agree with me there is no conclusions in your report. Right?

A No, there is no conclusion.

Q And there is no reference to potential violations. Right?

A No.
Q Did you start this report around April 19, 2020?
A No.
Q When did you start it?
A I can tell you sometime after -- in September, I started the report. The April date is the conclusion of my summary report.
MR. MATTHEWS: I want to direct your attention to numbered Page 55 which is Page 17 of 22 of your report.
MS. MC KENZIE: Say it once more.
MR. MATTHEWS: Bates No. 55 which is Page 17 of 22.
Q Are you there?
A You said Page 55? 55?
Q Yes. Just some clarification on the 22 pages or the 23 pages issue. Was there a prior draft of the report and then you added a page to it?
A It is possible. I do the report throughout the time I am investigating it.
Q Do you know why the original wasn't provided to Officer Zens?
A I don't know.
Q Do you know why the numbers -- Let me ask this. You don't individually type in the page numbers. Right?

A No. It is normally generated.
Q Automatically populated. Right?
A Yes.
Q It looks to me -- I am just asking -- like, there was a 22-page report and then someone changed the last four pages and made it a 23-page report because it is even a different font. Is that what happened? I am asking.
A I can't tell you what happened. I am not aware that that is what happened.
Q On Page 55 still, toward the bottom, it says, "PI-21 Statement Police Officer Nikolas Zens." Right?
A Yes.
Q SOP 450, which is Exhibit 10, plays out how you conduct a PI-21. Right?
A I am sorry. What page are you on?
Q Exhibit 10. I wasn't trying to trip you up on that. It tells you how to do a PI-21. Right?
A I thought you were looking at something specific.
Q No. It tells you how to do it. Right?
A Yes.
Q You also mentioned you went over the provisions of the Code of Conduct that requires you to be completely honest and accurate. Right?
A Yes.
Q If you look at that portion on Officer Zens, does it

tell you when the PI-21 was?

A In my report, it does not.

Q Is that information important?

A Yes.

Q This is the only report in this case. Right?

A The only report in --

Q From Internal Affairs in this case.

A I am sorry?

Q Other than your one-page Response to Charges memo and your initiation report, this document is the only report prior to the lieutenant's cover. Fair?

A Fair.

Q Turn to the second page of your report. It says you reviewed and summarized the Use of Force report. Right?

A Yes.

Q Submitted by Police Sergeant Matthew Mengel. Right?

A Yes.

Q Look at the second paragraph, second line. What does it state?

A "At the back of the house"?

Q No. Second paragraph. Yes, it starts, "at the back of the house," the second line. What does the second line say?

A "Officer Zens metered the doorway and continued to deliver verbal commands for Mr. Brown to

show his hands."
Q You have been present during the testimony today?
A Yes.
Q And one of the issues is whether or not Officer Zens metered when he went into the back yard. Right?
A Yes.
Q When he -- If he metered the doorway, as the Use of Force report says or as you wrote down, does that trump not metering the back of the house? In other words, if he didn't meter the back of the house, but then metered the doorway, did he still get a meter in?
A According to the report or the Use of Force report, yes.
Q This is your report and your summary.
A The Use of Force report is not my Use of Force report. I summarized the Use of Force report.
Q You put in there, "I reviewed and summarized it." So this is your summary.
A Yes. I summarized the Use of Force report.
Q And we don't want to get into whether you copied and pasted it, but is it fair to say the language we see here for this portion was copied from that report?
A Yes.
Q If you go down two more paragraphs, the one that starts with "at the rear entrance of the house," can you read that one in?

A "At the rear entrance of the house, approached and meters around the rear entrance to the house, still verbalizing commands, 'Let me see you fucking hands, right now!'"

Q That should be "your." Right?

A Yes.

Q What is important in what I just read is that you also again wrote that he metered the rear entrance of the house. Right?

A Yes, I wrote that in the report.

Q So we have two instances just right here of Officer Zens metering. Right?

A Yes.

Q Did you assist in drafting the Charges and Specifications?

A I did.

(Documents were marked as Exhibits 14 and 15)

Q In front of you, you should have Exhibits 14 and 15. Those are the Charges and Specifications against Officer Zens and then the last page of each is the backside of the final page showing what discipline was handed down. Is that fair?

A One moment. Yes.

Q According to both documents, they were dated July 21, 2020. Right?

A Yes.
Q If you look at Exhibit 13, when is that dated?
A That one is dated July 27.
Q So you drafted the charges before Officer Zens responded?
A The charges do come before the Response to Charges. He has to be served the charges and then he is allowed to respond.
Q These are the final ones that the chief looked at. Right?
A Are you speaking of 14 and 13 -- or 15?
Q 14 and 15. Looking at Exhibit 15, which is the 20-day suspension, right?
A Yes.
Q Turn to the -- Page 2. Go down to the last paragraph. It says,

"Zens failed to adhere to policy when he failed to stop and look for the suspect after losing sight of him."

Where did you pull that from?
A That would have either come from the DAAT manual or Tactical Response manual.
Q It said in your specification that it is probably from the Tactical Response because that is the one you mentioned. Right?

A Yes.
Q Under "Tactical Response," does it say that that procedure you mentioned is a required or a general guideline?
A I am not sure.
MR. MATTHEWS: Well, it is in your report, Exhibit 9. I hate jumping around, but Bate stamped 58, Page 20 at the bottom.
MS. MC KENZIE: What was your question?
THE WITNESS: Can you repeat your question?
MR. MATTHEWS: My question was, the charge -- the specification says he failed to follow the policy of stop, look and listen. My question was, is that a policy or a general guideline? Then I asked, in the tactical response, whether or not it says it is a general guideline. She said she didn't know, so then in her report, she has the very language at the bottom of Page 58.
A Here, it says "general guidelines."
Q If you go to the next page, it includes what you are talking about, "Specification." Right?
A Yes.
Q That is the language on the next page at the top of

59 that you pulled in the Specifications. Right?
A Yes.
Q Officer Zens, just so I am clear, was given a 20-day suspension for not following general guidelines. Is that fair?
A It is fair.
Q Looking at Exhibit 14, during the -- turn to the third page. You have laid out what is required before discharging your weapon, the "Target Requirements," right? And then you specifically list out "Target Isolation." Right?
A Yes.
Q Did you list out the greater danger exception there?
A No.
Q Turn to the next page, the actual "Specification." It should be Bates No. 9 on the bottom. Last paragraph.
"Zens failed to adhere to policy when he failed to meet the deadly force requirement of target isolation."
Do you see that?
A Yes.
Q Is it the policy that you have to have target isolation?
A You mean the MPD policy or within that particular book?
Q Any of them.
A For this one, I believe the policy states you should

adhere to the DAAT manual tactical response for fire-arms.

Q Again, if you look at the specification above on that page, it says "Tactical Response Training Guide." Right?

A Yes.

Q But the Tactical Response Training Guide says nothing about use of deadly force. Right? That is covered in firearms and DAAT. Right?

A I can't recall.

Q That is an error in the specification. Right?

A It is possible.

Q Is it important to get that right?

A Of course, it is.

Q In your report, again, on Page 58 -- Let me know when you are there.

A I am there.

Q It should be a bold heading that says "Referenced Training Material." Do you see that part?

A Yes.

MS. MC KENZIE: You said Exhibit 9, Page 58?

MR. MATTHEWS: Yes, ma'am.

A This is not in bold. It is just written there.

Q Got it. So if you look under "Mr. Kevin Brown's

history," it says, "Referenced Training Material" and that's the start of a new section. Right?

A Yes.

Q Then you list out what you looked at. Right?

A Yes.

Q The first one, it is the firearms guide. Right?

A Yes.

Q Then you quote some language from the firearms guide. Right?

A That is correct.

Q And that language is also present in the DAAT manual. Right?

A Yes.

Q But it is not in the Tactical Response Guide.

A I am not sure if it is in the Tactical Response Guide. At this time, I am not sure.

Q Then under "Target Isolation," is that what is required for target isolation or does the definition in Firearms say something different?

A I don't have it in front of me to tell you if it says something.

MR. MATTHEWS: Let me pull it up.

Q It's Exhibit 4, Page 54. Are you there?

A Yes.

MR. MATTHEWS: Why don't you flip

back one page.

THE WITNESS: To Page 53?

Q Correct. Do you see where it says "Target Requirements"?

A Yes.

Q It is "target acquisition." Right?

A Yes.

Q Are there any sections under the definition of "target acquisition"?

A Not specifically in that paragraph there.

Q So you didn't put that in your report because there are no exceptions. Right?

A No, it is not that I didn't put it in the report because there are no exceptions.

Q If there would have been an exception to target acquisition, you would have put that in your report. Right?

A (No response)

Q Your job is to gather the facts. Right?

A You are correct. But it is not in my report.

Q Again, for target acquisition, it is not in your report because there is no exception to target acquisition. Right?

A Yes.

Q The same thing for "target identification." There is no exception for target identification, so you didn't put

that it in your report.

A Correct.

Q Now, we get to "target isolation." There is an exception. Right?

A Yes, there is.

Q And you put that in your report. Right?

A Let me refer back to my report.

MR. MATTHEWS: Page 58.

A No, I didn't put it in my report.

Q You didn't put it in your report.

A No, I did not.

Q So the one exception to the targeting requirements, and you didn't put it in your report.

A That is correct.

Q Isn't that important?

A Sort of.

Q Isn't that the reason we are here today? Right?

A It is the reason we are here.

Q So the most critical element of this case and you left it out of your report. Right?

A It is left out of the report.

Q And you'd agree with me that's a violation of the Code of Conduct. Right?

A I am going to say it is a violation to leave things out intentionally, but, as I said, this is not in the

report.
Q Did you find any facts during your investigation or uncover any information that Officer Zens violated the state's guidance on target isolation?
A Yes, I believe through the interview.
Q What happened during the interview that leads you to that conclusion?
A When I posed the question to him if he had target isolation or not.
Q And he said no.
A That is correct.
Q You knew that as long as he didn't have target isolation, he failed to follow the guidance. Right?
A At that point, sure.
Q So if he told you that during your PI-21, doesn't that make the possibility of the greater danger exception even more important?
A I can't answer your question if it makes it more important.
Q In other words, if somebody just told you they didn't have target isolation but you know there is an exception to target isolation, that you uncovered that, isn't that important to know whether that exception applies?
A Sure, yes.
Q Isn't that part of gathering the facts?

A Yes, sure.
Q Isn't that your only job?
A Sure.
Q And you didn't do that. Right?
A I did not put that in the report.
Q You didn't ask Officer Zens any questions about the greater danger exception, did you?
A I don't believe I asked him any questions specifically about the greater danger.

MR. MATTHEWS: That is all I have.

MR. KONRAD: Mr. Matthews, you made reference to parts of her report where there was use of the words "metered the corner."

MR. MATTHEWS: Yes, sir.

MR. KONRAD: Could you tell me where on this exhibit --

MR. MATTHEWS: Page 2.

MR. KONRAD: Are you talking about Exhibit 9?

MR. MATTHEWS: Yes, sir.

MR. KONRAD: Page 2. 2 of 22. Right?

MR. MATTHEWS: Yes. The numbers match until 19. It is the second main paragraph down, the second sentence. It starts, "Officer Zens metered."

Then it is the fourth paragraph down. "At the rear entrance of the house."

MR. KONRAD: Thank you.

MR. MATTHEWS: We have Sergeant Mengel here. He can testify to that.

MR. KONRAD: Thank you.

Mr. Pederson?

MR. PEDERSON: Thank you.

REDIRECT EXAMINATION BY MR. PEDERSON:

Q I direct your attention to Page 60 of your report. Once there, I would direct your attention to the first full paragraph. Do you see that there?

A Yes, at the top.

Q Yes. Is it correct to say that this is a portion of your summary report where you are reporting Sergeant Groszczyk's statements regarding the greater danger exception and his findings?

A Yes.

Q So is it, therefore, accurate to say that, at least at this point, you did discuss the greater danger exception?

A Yes, after seeking Sergeant Groszczyk's professional opinion.

Q Despite the fact that you are not an instructor, as you previously testified, do you believe you have the

knowledge, training, experience and competence to conduct the investigation in this matter?

A Yes.

Q Despite whatever oversights you have made or may have made, did you attempt to bring a reasonable degree of due diligence to the investigation?

A Yes, of course.

Q To your knowledge, has anyone come to you and advised you that your report was incomplete?

A No.

Q Or that it caused troubles in the investigation in any manner whatsoever?

A No.

MR. PEDERSON: That is all I have.

MR. MATTHEWS: Just one brief follow-up.

RECROSS-EXAMINATION BY MR. MATTHEWS:

Q Just looking at Page 60 of your report, again, you copied and pasted what Sergeant Groszczyk said in his report, so this is just a verbatim copy of what he said. You make mention of the greater danger exception in your report because he wrote about it in his report. Is that fair?

A Well, this is a summation of his report. These are his words, what he wrote.

Q All right. You keep calling it a "summation." Exhibit 7 is Sergeant Groszczyk's report. Again, the paragraph that we are looking at on Page 60 of Exhibit 9, that matches an exact paragraph in Sergeant Groszczyk's report. Right?

A Yes.

Q It is not a summary, it is just a copy of what he said. Right?

A Sure.

Q When you read Sergeant Groszczyk's report or when you copied it into your own report, did you do anything with the greater danger exception?

A What do you mean, "do anything with it"?

Q Did it cause you to investigate further? Did it cause you to modify the report at all?

A No, it did not.

MR. MATTHEWS: That is all I have.

MR. PEDERSON: Nothing.

MR. KONRAD: Commissioners, any questions?

All right. Thank you, Sergeant.

(Witness excused)

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: I have one additional witness, but, as I indicated earlier today, due to

unforeseen events because of a sudden onset of a quarantine, that witness is not available to testify here today. So that is all I have prepared for presentation on Phase 1 today, although, like I said, I do have that one additional witness. I would propose to have that witness available or an alternative witness on Friday.

MR. MATTHEWS: We have a witness ready to go.

MR. KONRAD: Okay. We will interrupt your case and your witness and then we will go back to your case on Friday.

MATTHEW MENGEL, having been first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth testified as follows:

MR. KONRAD: The witness is sworn.

DIRECT EXAMINATION BY MR. MATTHEWS:

Q What is your name, sir, spelling your last name for the record?

A Matthew -- M-a-t-t-h-e-w. Last name is Mengel. M-e-n-g-e-l.

Q How are you currently employed?

A I am a police sergeant with the Milwaukee Police Department.

Q How long have you been a sergeant?

A Two and a half years.
Q How long have you been with the department overall?
A Just over 13 years.
Q Do you know Officer Zens?
A I do.
Q How so?
A I was his direct supervisor.
Q For how long?
A For the period of August or July of 2018 until July of 2020, about two years.
Q And I recognize this is a Phase 2 question, so I apologize in advance, but any issues with him as his supervisor?
A Issues as in --
Q Performance issues.
MR. KONRAD: You are asking if he had issues as his supervisor.
THE WITNESS: No.
Q Are you a DAAT, firearms, tactical response expert, trainer or instructor?
A I am not.
Q Have you ever been on foot pursuits?
A Yes.
Q Approximately how many?
A A dozen over the course of my career.

Q Have you ever lost sight of a person you were chasing?
A Yes.
Q Were you disciplined for that?
A No.
Q Did you stop as soon as you lost sight of an individual?
A No.
Q As part of your role as a sergeant, do you watch body cam footage of foot pursuits?
A Yes.
Q Have you seen officers losing sight of a person they were chasing?
A Yes.
Q And do you recommend discipline when you see that?
A No.
Q Even if the officer loses sight of them and continues running?
A No.
Q That is within your authority. Right?
A Yes.
Q You were involved in the underlying incident in this case. Right?
A Yes.
(A document was marked as Exhibit 16)
Q I have placed in front of you what's been marked as Exhibit 16. Do you recognize that document?

A Yes.
Q What is it?
A It is a printed copy of the Milwaukee Police Department's Use of Force that I completed regarding this incident.
Q Your -- your opinion was not part of your investigation. Right?
A No.
Q You just write down what you observe. Right?
A Yes.
Q Who tasked you with the Use of Force report?
A It would be -- it was my lieutenant per the Criminal Investigation Bureau.
Q Have you done them before?
A Yes.
Q Approximately how many?
A At this point in my career, probably a couple dozen.
Q What is the Use of Force report?
A It is documentation of force being used by Milwaukee Police Department officers through the course of their duties upon members' interactions.
Q Why is one completed? Do you know?
A To document the use of force.
Q To paint the whole picture of what happened?
A Maybe not the whole picture, but create a record of the

force being used.
Q When are they needed?
A Whenever there is a firearm discharged by a member, chemical weapons such as OC, batons, electronic control devices used, decentralizations and anytime any person would make a complaint about pain or injury on their contact with officers.
Q Was the Use of Force report completed in this case any different than the other ones you have done?
A No, just besides it being a firearm use.
Q Was it any more difficult than the normal or typical Use of Force?
A No.
Q Did you approach it any differently?
A No.
Q How did you complete it?
A Based on my experience that night, responding to the original call coupled with use of the computer-aided dispatch report, the CAD printout, a synopsis of the events that I received from our Criminal Investigation Bureau and then my own observation of the body worn camera video from Officer Zens.
Q Turn to the last page of the report. In the middle of the page, it says, "Statement of Police Officer Nikolas Zens." Do you see that?

A Yes.
Q It says, "P.O. Zens did not make a statement." Right?
A Correct.
Q So everything that you put in this report was based on what you just said and not based on anything Officer Zens told you. Right?
A Correct.
Q And you reviewed the body cam. Right?
A Yes.
Q And that says it on Page 6. Right?
A Page 6 of my report, yes. Page 6. Yes.
Q Look at the second paragraph down from "Review of Body Worn Camera." Do you see that?
A Yes.
Q It says,

"At the back of the house, P.O. Zens, who is still running, approaches and meters around the rear entrance to the house."

Correct?
A Correct.
Q You were able to observe that by watching the video. Right?
A Correct.
Q Did you have any idea, when you wrote that, that whether or not Officer Zens metered that doorway would become an

issue?
A No.
Q If Officer Zens failed to meter at any point, did he pick up metering before he discharged his weapon?
A (No response)
Q Let me ask it differently. In other words, if there is an on/off switch for metering and he turned it off, like, he wasn't metering, did he turn it back on before he discharged his weapon?
A As he is coming to a stop, from my recollection of the video, he slowed down. You can see he metered past that doorway, so, from my recollection, I'd say yes.
Q So assuming there was a gap in metering, he still metered up at the crucial point. Is that fair?
A Correct.
Q You also -- If you go above that page, the first full paragraph, the second line down, you say,

"P.O. Zens metered the doorway."

Do you see that?
A Yes.
Q And, again, in order to meter something, you have to have to be, like, observing the pieces of the pie. Right?
A Yes.
Q And you were able to determine that from your review of

the video. Right?

A Based on the way the camera was pointed, it was my -- it was my opinion that he was metering.

Q You also put in your report that you couldn't observe the subject very well. Right?

A Yes.

Q Because it was so dark. Right?

A Yes.

Q I want you to assume that Officer Zens is accused of not metering after momentarily losing sight of the subject. Is that consistent with what you saw?

A No.

Q If you had to review a hundred MPD foot pursuits, would you find similar conduct?

A Yes.

Q In other words, do officers routinely go around blind corners during foot pursuits?

A Yes.

Q Are you aware of any discipline for that conduct?

A I am not.

Q So at least on paper, it appears Officer Zens is being singled out?

A On paper, it seems that way.

Q Did you think anything he did besides his choice language was outside of policy?

A No.
Q After you completed the report, did you conduct policy review/counseling with Officer Zens?
A Yes.
Q And is that documented on the second page of the report?
A Yes.
Q Specifically, you counseled him on 5.01 and 5.02. Right?
A Yes.
Q Are those regarding professionalism, I believe?
A I believe so, yes.
Q And the counseling was for the choice language. Right?
A That's correct.

MS. MC KENZIE: What you are referring to? What document?

MR. MATTHEWS: What document?

MS. MC KENZIE: Yes.

MR. MATTHEWS: Still on the Use of Force report, Exhibit 16, Page 2. The second page.

MS. MC KENZIE: Go ahead.

MR. MATTHEWS: Page 225. Right in the middle, "Action Taken."

MS. MC KENZIE: Thank you.

BY MR. MATTHEWS:

Q Turn to Page 4 of your report. It says "Assignments"

at the top. Right?

A Yes.

Q What is that referring to?

A That shows that basically, who -- who the report was, I believe, sent to. So it was initiated by myself and then I sent it or tracked it to my supervisor who then disseminated it to acting-Captain Winfrid Finkley and then the assistant chief at the time, Michael Brunson.

Q Just so I am clear and the commissioners can understand as well, under "Assignments," you put the first entry in on the date of 9-8-19 and then it moves down chronologically from where the document went from there. Right?

A Correct.

Q So you sent it to Captain Wilson. Right?

A Lieutenant Wilson.

Q Lieutenant Wilson. Then Lieutenant Wilson sent it to now-Chief Brunson. Right?

A Yes.

Q And then Lieutenant Wilson also sent it to, I believe, acting captain Lieutenant Finkley. Right?

A Yes.

Q Turn the page. Acting Captain Finkley sent it to Michelle Pagan --

A Yes.

Q -- at Internal Affairs and said that there was a critical incident for them to investigate it per SOP. Correct?
A Correct.
Q Going back to Page 4, Lieutenant Wilson is your supervisor?
A Right. Yes.
Q And he put in his notes that -- first that the incident was in compliance with rules and procedure. Right?
A Yes.
Q And then he said,

"It is my determination that the officer's actions during the use of force were in compliance with MPD policy and procedures."

Right?
A Yes.
Q So he had no problem with anything Officer Zens did.
A No.
Q Except for the choice language. Right? Because he said his use of profanity should be given a policy review. Right?
A Correct.
Q So lieutenant Wilson, his final determination was policy review for the language. Everything else was within policy and procedure. Right?

A Correct.
Q And acting-Captain Finkley also reviewed the incident. Right?
A Yes.
Q And he said,
"I concur with Lieutenant Wilson."
Right?
A Yes.
Q And he said profanity needs to be addressed for a policy review. Right?
A Yes.
Q What did he say after that?
A "I find that all other police actions taken during this incident are in compliance with department policies and procedures."
Q You reached that same result. Right?
A Yes, from my viewpoint.
Q And if you would have had a different viewpoint, you would have put that in your report or alerted your supervisors. Right?
A Correct.
MR. MATTHEWS: That is all I have for you. Thank you.
MR. KONRAD: Mr. Pederson, any questions?

MR. PEDERSON: Yes, thank you.

CROSS-EXAMINATION BY MR. PEDERSON:

Q Sergeant, have you ever metered a corner?

A Yes.

Q Have you ever metered a corner while in pursuit of someone that you lost sight of?

A Yes.

Q Why did you do that?

A For my own safety.

Q It is consistent with your training as well. Right?

A Yes.

Q There is just logical, tactical reasons why it puts you in a better position. Right?

A Correct.

Q But, as you are saying, that is not necessarily maybe in every single situation where you lose sight of someone around a corner should you necessarily come to a full stop and slow the meter. Is that your testimony?

A Yes.

Q But you'd agree with me, though, that when you are going around, say, quickly a corner, you should still take some caution and meter to the best of your ability. Right?

A Yes.

Q That is to say, it would be a tactical error to just run

blindly around a corner if -- if you didn't absolutely have to. Right?

A Yes.

Q Okay. And whether or not you should have done it more slowly or more quickly, we can agree that metering is a good, fundamental tactical skill and effort made by police officers in exercising their duties in the field. Right?

A Yes.

Q All right. And each particular situation is dynamic and a different officer might do something differently. Right?

A Yes.

Q Is it your position that in your review of the video, that you're taking the absolute position that Officer Zens should not have metered that first corner?

A I would say yes, based on the distance between Officer Zens and the suspect and the likelihood of that suspect being able to -- You meter to prevent an ambush. It is one of the major reasons, but the limited amount of time between Officer Zens losing sight of the suspect around the corner I didn't think -- in my opinion, that didn't provide him an ample amount of time to set up an ambush. If Officer Zens would have slowed down -- he is running in unfamiliar territory at nighttime, he

can't see the ground in front of him. If he were to slow down, that might have given that person an opportunity to --

Q A police officer accidentally shooting an innocent bystander is a pretty serious critical event?

A Right. Yes.

Q And that needs to be looked at closely by Internal Affairs and ultimately, the chief, doesn't it?

A Yes.

Q Isn't it reasonable that the chief, in examining that closely, might look at other potential problems that may have led up to that?

A I think it is reasonable, yes.

Q So would you agree with me that the fact that Officer Zens is getting scrutiny for the metering issue here isn't necessarily inconsistent with the other times you think that other officers failed to meter. Right?

A You are saying that -- Could you --

Q Let me restate the question. You indicated you are aware of other instances you have done where you think you believe you have seen similar decisions by officers and not metering corners such as you saw in this video. Right?

A Yes.

Q And those officers didn't receive discipline.

A Correct.
Q Were those officers under the same kind of scrutiny that Officer Zens was due to the nature of the seriousness of this investigation?
A They were not.
Q Would that be some explanation, at least, why Zens was subjected to additional scrutiny, because of that context?
A Possibly.
Q Ultimately, your job is to gather the facts and forward that on. Is that right?
A Yes.
Q Is there anything that you have seen that has happened as a consequence of this that you believe is patently against SOPs or against the discretion of the chief in exercising his duties?
A Define "patently."
Q Just clearly on its face.
A Is there anything -- Say it again.
Q I can restate the question for you. My question for you is despite --

MR. COCROFT: We can't hear the witness.

MR. PEDERSON: He's asking you to speak more clearly.

THE WITNESS: I asked him to repeat the question.

MR. PEDERSON: Let me rephrase the question, if I could.

Q Are you aware of anything in terms of the discipline issued in this case that is directly contrary to SOP or that is somehow against the department's own policies or Code of Conduct?

A Am I aware if there is any punishment that --

MR. PEDERSON: Let me rephrase. Perhaps I am having some difficulty stating it.

MR. KONRAD: It is a pretty broad question.

MR. PEDERSON: Sure. It is.

Q Do you have any knowledge or information that, for certainty, that Zens should not have been exposed to the discipline he was exposed to?

A No.

MR. PEDERSON: That is all I have.

MR. KONRAD: Mr. Matthews?

MR. MATTHEWS: Just briefly.

REDIRECT EXAMINATION BY MR. MATTHEWS:

Q Attorney Pederson essentially admitted that Officer Zens was being treated differently in this case because there is extra scrutiny that was received due to shooting an

innocent person. Do you remember those questions?

A Yes.

Q Shouldn't officers all be treated the same?

A Yes.

Q And Zens shouldn't be subject to different scrutiny than other officers just because his case was more publicized. Right?

A No.

MR. MATTHEWS: That is all I have.

MR. KONRAD: I have a question here on your Exhibit 16, Page 5. At the very top of the note, the note here entered, "Further Investigation Warranted." Did you put in this note?

THE WITNESS: No, that was not me.

MR. MATTHEWS: I can explain that, Examiner Konrad.

MR. KONRAD: Okay. You didn't enter it?

THE WITNESS: No.

MR. MATTHEWS: That is a process for all critical incidents, use of force. They are automatically forwarded for further investigation.

MR. KONRAD: I see. That's per the SOP.

MR. MATTHEWS: Yes. I think Michelle

Pagan works at Internal Affairs and that is why the acting captain sent it to her basically saying, "it is a critical incident, so it automatically needs to be investigated further."

MR. KONRAD: And that's irrespective of these --

MR. MATTHEWS: It even says per SOP, yes.

MR. KONRAD: -- notations. Thank you.

MR. MATTHEWS: It is SOP 453.

MR. KONRAD: Right.

Do the commissioners have any questions? Hearing none --

MR. COCROFT: Chair, that further investigation warranted, is that done by the chief and his command staff as far as charges are concerned?

MR. KONRAD: He means the further investigation that is noted here that is required per SOP, because it was a critical incident, who conducts that?

THE WITNESS: I would assume that the Internal Affairs Division. That's a little above my pay grade.

MR. KONRAD: The answer was the

Internal Affairs Division.

MR. MATTHEWS: We can bring those SOPs on Friday if the commissioners would like.

MR. KONRAD: No, I just wasn't familiar with the procedure.

Any additional questions? No?

Thank you, Sergeant.

(Witness excused)

MR. MATTHEWS: That is the only witness I have.

MR. KONRAD: Could we maybe discuss the plan for Friday? I hope we have a plan that we can finish.

MR. MATTHEWS: I think -- That is always the goal. We will call Lieutenant Looney. I guess technically, Robin should call Lieutenant Looney.

MR. KONRAD: Because it's his witness, so he will call him.

MR. MATTHEWS: Well, he wasn't going to call him until this morning, so I was going to call him, so he was my witness this morning.

MR. KONRAD: It is still his case. We just took a little time out to figure -- out of order, so it is up to him whether he calls Looney or not.

MR. COCROFT: Is the sergeant still in the room? I have another question on that incident report.

MR. KONRAD: We will see if we can catch him.

MR. MATTHEWS: The plan again, going forward, would be one of us will call Lieutenant Looney, probably Robin, and Robin will rest and then I will call Willis, our expert, and then I think we'd rest then and we would potentially have a Phase 2.

MR. KONRAD: Thank you.

MS. TRIGGS: He is coming back.

(Discussion off the record)

MR. KONRAD: Commissioner Cocroft has an additional question that he thought of after I dismissed you. You are still under oath.

Commissioner, go ahead.

MR. COCROFT: Okay. Sergeant, what I was asking on that first page, No. 16, your incident report for use of force, it says the subject, Tari Davis, the various subjects, you know, that he was -- it says "Charges requested: Outstanding warrants." "Criminal record, "yes." And then it says, "Act of Committing Crime: Yes." So were you saying that the -- "I have been to the house to commit a

crime"? Is that what I'm seeing here?

THE WITNESS: At the time of this report, it appeared that the -- Tari Davis was assisting the fleeing suspect in evading the police. That is why I indicated that, yes.

MR. COCROFT: Okay. I just wanted to clear that up. Is that how it was resolved? Is that solid right now? Is that set in stone?

THE WITNESS: I don't know if -- I don't think he was charged. I don't know the outcome of that investigation, to be honest.

MR. COCROFT: Thank you. Have a good evening. I didn't mean to drag you back in here.

MR. KONRAD: Thank you, Sergeant.

(Witness excused)

MR. KONRAD: It is now approximately 20 minutes to 4:00. Actually, more like 17 minutes to 4:00, so we will adjourn and we will convene on Monday -- or Friday, same place at 8:30.

(WHEREUPON, THE PROCEEDINGS WERE ADJOURNED AT 3:43 P.M.)

MR. KONRAD: Good morning. It is Friday, December 18, 2020 at approximately 8:45 a.m. This is a continuation of Phase 3 -- Phase 1 in the disciplinary appeal hearing in the matter of Nikolas Zens addressing MPD Personnel Order 2020-76.

My name is Rudolph Konrad. I am the hearing examiner presiding over this matter. Fire and police commissioners who are serving on the hearing panel are Vice Chair Commissioner Angela McKenzie, Commissioner Fred Crouther and Commissioner Everett Cocroft. We will now continue with Phase 1 of the proceeding and we will begin.

Nikolas Zens, by his attorney, Brendan Matthews, disputes the charges against him. Could we have appearances for the record? For the appellant?

MR. MATTHEWS: For the appellant, Nikolas Zens, who also appears in person with Brendan Matthews and Rebecca Meyer, Cermele and Matthews.

MR. KONRAD: Thank you.

For the city?

MR. PEDERSON: For the city, Deputy City Attorney Robin Pederson and my court officer today is Lieutenant Liam Looney.

MR. KONRAD: All right. Where we

left this off, the city was presenting its case and it interrupted its presentation to take a witness for the appellant and we completed that testimony. So now, we are back to the case in chief presented by the city.

Mr. Pederson?

MR. PEDERSON: The city would call Inspector Formolo.

PAUL FORMOLO, having been first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth testified as follows:

MR. KONRAD: The witness is sworn.

DIRECT EXAMINATION BY MR. PEDERSON:

Q Would you, please, state your name for the record?

A Paul -- P-a-u-l -- Formolo. F-o-r-m-o-l-o.

Q Are you a sworn member of the Milwaukee Police Department?

A Yes, sir.

Q How long have you been a sworn member?

A Since December 2 of 1996, just finished 24 years.

Q What is your current rank?

A Inspector.

Q How long have you been an inspector?

A Since September of 2020.

Q What were you before you were an inspector?

A I was actually the acting assistant chief of police for

the Criminal Investigation Bureau approximately five months and prior to that, I was a captain in charge of the Violent Crimes Division.

Q Did you have any opportunity to review in the past or did you have -- Strike that. Did you have any involvement in the past regarding the discipline appeal concerning Officer Zens?

A Yes, I did.

Q What was your involvement in the past?

A In the past, I was present with the other members of the executive command staff or team in reviewing the incident and rendering a disciplinary decision.

Q Okay. Were you a part of the meeting that is commonly held when the chief --

MR. MATTHEWS: I'm going to object to this witness's testimony. He is not on the witness and exhibit list.

MR. PEDERSON: He is the chief's designee. He is testifying on behalf of the chief. Here, it is a little different than normal in that it is also relevant to Phase 1 in addition to Phase 2 because here, the chief made a determination in the discipline review of why there is a violation in addition to what the violation should be. So he is testifying in that capacity.

MR. KONRAD: The objection is overruled. Continue.

BY MR. PEDERSON:

Q I believe the last question I had is, were you a part -- did you participate in that meeting where the chief typically holds to review the case and decides what discipline is?

A Yes, sir.

Q Have you done anything to prepare yourself for today's testimony?

A Yes, sir.

Q What have you done?

A I reviewed the reports that were submitted by the Criminal Investigation Bureau and by the Internal Affairs Division, including reviewing body worn camera and listening to audio recordings of interviews.

Q Very good. During the chief's discipline review which occurred, was there any review of the PI-21 of Officer Zens?

A Yes, sir.

Q Did he make any statements during the PI-21 that were of any significance or consideration?

A Yes, sir.

Q Are you able to give us an idea of what some of those things were?

A Sure. Obviously, the PI-21 interview went into great detail as to his involvement in the incident, what led up to the incident, but of particular interest to us were his statements relative to the foot pursuit that preceded the shot fired and obviously, his perception or what he observed, his observations, when he determined to fire his weapon.

MR. PEDERSON: I will now play some portions of the PI-21, so, Niko, I do the screen first?

MS. TRIGGS: Yes, sir. And then "share."

(Video was played)

Q I have played the first 18 seconds. Does that sound like it is a PI-21 that you had previously listened to?

A Yes, it is.

MR. PEDERSON: I am now going to advance to the first relevant portion at approximately 15 minutes, 21 seconds. It's difficult to be precise with this thing, but I will get it as close as I can.

(Video was played)

Q Did you hear that portion of the video?

A I did, sir.

Q Was that portion significant to you in any way?

A Yes, it was.

Q Please describe to the commissioners why that was a

significant portion.

A That is, obviously, not congruent to the LESB, Wisconsin Law Enforcement Standards Board Tactical Response manual. Specifically, that when you lose sight of a person that you are pursuing on foot, it is no longer a chase; it becomes a search. You are supposed to stop, listen, look. Another concern is when you suspect or believe that somebody is armed, it is highly advised that you not follow that same flight path as the individual, as that could increase danger to the officer and that basically, it is in the -- in the person's that you are chasing line of sight, if you will, and it's expected that you increase your distance so that you have a better reaction time.

Q I direct your attention to Exhibit 8. It should be in front of you. Inside, there should be Page 17. Do you see the paragraph that starts, "if you decide to pursue"?

A Yes.

Q I will read that.

"If you decide to pursue, remain tactically flexible. Do not allow yourself to be sucked into a mindset of 'I'm going to catch this guy at any cost.'" Did I read that correctly?

A Yes.

Q All right. Was that part of the consideration in the comments there?
A Absolutely. Based off his responses to those questions, it was clear to us that he was in that mindset. He was going to catch this individual at all costs.
Q Does he specifically say, "I want to get the guy"?
A He does.
MR. PEDERSON: I will replay that portion.
(Video was played)
Q Okay. What was the relevant portion that you heard there?
A That he wanted to keep going, he wanted to catch him.
MR. PEDERSON: So you know, I am going to go -- for the record, I stopped the video at 16:53. I am now going to proceed to 24 minutes, 47 seconds.
(Video was played)
MR. PEDERSON: I am stopping at 25:38.
Q Was that a significant portion that was considered at the time?
A Yes.
Q How so?
A It clearly demonstrates he was aware that there was

an innocent bystander in the immediate vicinity of Mr. Brown, the person he was chasing.

MR. PEDERSON: I will now forward it to the 28-minute, two-second mark.

(Video was played)

MR. PEDERSON: I am stopping at 29 minute, 37 seconds.

Q Was that portion significant in any way?

A Yes. There is an admission that he shot a person who was not his intended target.

Q He was also asked some questions about whether or not Mr. Davis posed a threat. Did you hear that portion?

A I did.

Q Was that significant at all?

A Yes. He explained that Mr. Davis was not an immediate threat to him, he did not observe anything in his hands or any items in his hands that could be interpreted as a weapon.

MR. PEDERSON: Very good. Those portions were -- of the PI-21 were played from the first audio file. I am going to the second audio file. In that one, I am proceeding to the two-minute, 15-second mark.

(Video was played)

MR. PEDERSON: I am stopping at the

two-minute, 29-second mark.
Q Was there anything significant in that portion of the PI-21 that I played?
A Yes. The officer then stated that he wasn't concerned for the safety of Mr. Davis.
Q Were you aware, at the time of the decision-making with the chief, that Sergeant Groszczyk had issued a report with his findings and opinions?
A Yes, I was.
Q Were those reviewed?
A They were.
Q Is it fair to say that the chief did not decide to follow those recommendations contained in that report?
A Relative to the target isolation, yes, that is fair to say.
Q Let's go to metering first. Is it accurate to say that Groszczyk's report doesn't even address metering?
A Yes. I don't recall reading anything in that report about the metering in that report.
Q All right. Why was metering something that the chief ended up considering?
A It was part of the totality of the circumstances, the fact that metering was ignored. We felt that that cascaded into other events that happened and we felt if metering would have been applied as trained and as

directed by the LESB, that this situation may not have happened. There may have been other options available. All those types of reasons is why we considered metering.

Q Did you review the body worn camera of Zens at that meeting?

A I did.

Q Did the chief as well?

A Yes. We all viewed the body worn camera.

Q Very good. What, in totality, did you use in determining whether or not metering was appropriate in terms of your review?

A Can you repeat that?

Q Sure. Did you use body worn camera to determine whether or not he should have metered?

A Yes. That was one of the items that we used.

Q I presume, of course, also his statements regarding it.

A Right, because not everything is clear in the body worn camera.

Q Very good. When it comes to the target isolation, what was the determination -- why did the chief make the decision that he made there?

A The obvious fact was it was -- based on the body worn camera, it is clear that there was an innocent bystander in very close proximity to the intended target. That

was readily clear in the video because they were back lit. There was interior lighting from the residence that back lit them, so they stood out quite clearly. In addition to Officer Zens' statements during the PI-21 hearing and with the detectives for the critical incident interview.

Q You are familiar that the greater danger exception is -- allows an officer to shoot without target isolation. Right?

A Yes.

Q Okay. And you reviewed Groszczyk's comments and findings regarding that. Right?

A Correct.

Q Was the concept of the greater danger exception discussed during the meeting with the chief?

A We did discuss it, yes.

Q Why was -- why did the chief reach a different conclusion on the greater danger exception?

A Again, the totality of the circumstances. We felt that if training would have been applied from the beginning, proper training and tactics would have been applied from the beginning in the foot pursuit, this would have been avoided and clearly, his state of mind in that he saw there was an innocent bystander there and that he was not concerned for his safety, the safety of Mr. Davis.

Q During Sergeant Groszczyk's testimony, I asked him the question of whether he believed that Officer -- if an officer -- a reasonable officer in Officer Zens' position would have concluded that the suspect here, Mr. Brown, presented a greater danger to Officer Zens than Officer Zens posed to Mr. Davis, the person who was shot, and Sergeant Groszczyk offered the opinion "yes," do you and the chief, to your recollection, concur in that opinion?

A No, we did not concur with that opinion. No weapon was observed. We understand, we took into consideration that he couldn't see his hands and that he made a quick movement to him, but again, he was -- Officer Zens was standing in that fatal funnel, which is in that doorway. There was an opportunity for him to decrease the distance -- or increase the distance between him and that threat, which were not applied in the situation.

Q In your experience, is the chief bound by the opinion of Sergeant Groszczyk?

A No, he is not.

Q In your opinion, did the chief have the training, knowledge and experience to give Sergeant Groszczyk's due weight and consideration?

A Yes.

Q Did he ultimately have the information and authority

and advice to not follow the conclusion of Sergeant Groszczyk?

A Yes.

Q Do you believe that was the right decision?

A We do. I do, yes.

Q Was there anything more regarding the determination of a violation that occurred that you haven't already testified about that you think the commissioners should be aware of?

A I didn't catch the first part of that question.

Q Sure. I am wrapping up here. I am just wondering if there is anything else in the determination of the violation that I haven't asked you about or you haven't already testified about that you feel the commissioners should be aware of.

A Readily offhand, I can't recall anything right now.

MR. PEDERSON: That is all I have for direct.

MR. KONRAD: Mr. Matthews?

CROSS-EXAMINATION BY MR. MATTHEWS:

Q Inspector, first off, are you a DAAT instructor?

A No, sir, I am not.

Q Are you a firearms instructor?

A No.

Q Are you a tactical response instructor?

A No, sir.
Q Have you ever been any of those?
A No.
Q So is it fair to say there is individuals within the department that have more experience and expertise in those avenues than you?
A Yes, sir.
Q We played some portions of the PI-21. Right?
A Yes, sir.
Q You were asked some questions on those?
A Yes, sir.
Q And do you recall if there were any questions during the PI-21 on the greater danger exception?
A I am sorry?
Q Do you recall, in your review, you said you reviewed the PI-21 prior to your testimony today. Right?
A Yes.
Q Do you recall if Sergeant Norberg asked any questions about the greater danger exception?
A I can't specifically remember if she stated the greater danger exception, but there was conversations that, I believe, applied regarding that, in that he felt for his own -- he feared for his own safety.
Q Did Officer Zens say he took the same flight path around the corner as Mr. Brown?

A Not in those exact words, but based off of what he was stating, it was implied he was following right behind him. In one part of that statement, he said he was gaining ground on him.
Q So you testified earlier that you took issue with the fact that he took the same flight path. Do you remember saying that?
A Yes. He went around the same corner.
Q My question was, did Officer Zens explicitly say he took the same flight path?
A Not explicitly.
Q You were asked some questions on Exhibit 8. Do you remember that?
A Yes.
Q That is the Tactical Response Guide?
A Yes.
Q Specifically on Page 17 of Exhibit 8?
A Yes.
Q You'd agree with me that those are general guidelines. Right?
A They are general guidelines, yes.
Q In fact, it says it right on Page 17, it says these are general guidelines. Right?
A I am looking for that specific phrase. Can you direct me to the paragraph?

Q It is toward the top. It is the largest first paragraph. "Although your tactics," do you see that?
A Yes. I see it. Correct.
Q It says it is general guidelines. Right?
A Yes, sir.
Q So you disagree with the -- with everyone else that reviewed this body worn camera footage and the reports that there was an issue with the metering -- or the lack of metering. Right?
A Yes. There was a lack of metering.
Q Everyone else had no issue with that that looked at this. Right?

MR. PEDERSON: I am going to object to the foundation on that question.

BY MR. MATTHEWS:

Q Are you aware -- Did you review Sergeant Mengel's Use of Force report?
A That report, I have not reviewed that report specifically, no.

MR. MATTHEWS: It is Exhibit 16 in front of you. Take a minute to review it once you find it. And then let me know when you are ready.

THE WITNESS: I have it.

MR. MATTHEWS: Take a minute to review it and let me know when you are ready.

THE WITNESS: I scanned it.

Q I want you to turn to the third page -- I am sorry, the fourth page, Bates No. 227. Do you see that?

A I am on the fourth page, yes, sir, I see it.

Q It says "Assignments." Right?

A Yes.

Q In the second one down, it says,

"Assigned To: William Wilson, III."

Right?

A Yes.

Q Who is William Wilson, III?

A He would be the lieutenant at District 7.

Q That was the district that Officer Zens was at?

A Yes.

Q If you look at the second sentence in what he wrote, it says,

"It is my determination that the officer's actions during the use of force were in compliance with MPD policy and procedures."

Right?

A That is what is written here, yes.

Q So he didn't have an issue with the metering or the lack of target isolation. Right?

A That is what he wrote, sir.

Q If you go down to "Winfrid T. Finkley" at the bottom of

the page, who is that?

A He was another lieutenant at District 7. According to this report, he was the acting captain.

Q He says he completed a review of it and he concurs with what Lieutenant Wilson said. Right?

A That is correct.

Q And he said,

"Other than the use of profanity, I find that all other police actions taken during this incident are in compliance with department policies and procedures."

Right?

A Yes, sir.

Q And if we turn to the last page, this is the narrative that Sergeant Mengel wrote?

A Okay.

Q If you look at the second paragraph down from the top, second sentence, it says,

"P.O. Zens metered the doorway."

Do you see that?

A Yes, sir.

Q So it was Sergeant Mengel's interpretation that P.O. Zens metered in the back yard. Right?

A Yes.

Q If you go down to his review of the body worn camera, middle of the first paragraph, it says,

"Due to the incident occurring in the hours of darkness, and the fact that P.O. Zens was running, I could not observe the subject P.O. Zens was chasing." Right?

A That is correct.

Q And he continues, at the beginning of the next paragraph,

"At the back of the house, P.O. Zens, who is still running, approaches and meters around the rear entrance of the house."

Do you see that?

A What paragraph was that, sir?

Q The second paragraph down, first line.

A Yes.

Q So we have Sergeant Mengel noting twice that Officer Zens did, in fact, meter in the back yard. Right?

A That is what he wrote.

Q So we have -- this is what I've gone through before -- you are aware that Sergeant Groszczyk made no notes in his report about any issues with metering. Right?

A That is what I recall, sir.

Q So we have Sergeant Groszczyk, who is the master instructor trainer. Right?

A Yes.

Q We have Lieutenant Wilson and then we have acting-

Captain Finkley as well as Sergeant Mengel, all saying that they had no issues with the metering. Right?

A That is correct, sir.

Q In fact, Sergeant Mengel goes further and says there actually was metering. Right?

A At the doorway, yes.

Q At the rear entrance of the house, I believe.

A Yes.

Q You were asked some more questions on the PI-21. One of them was that Mr. Davis was not a threat; he was an innocent bystander. Right?

A Yes.

Q I believe Officer Zens said, at one point, that he was -- it appeared that Mr. Davis was trying to let Mr. Brown in. Right?

A Yes.

Q Was Mr. Brown a violent criminal at that point?

A He demonstrated actions that would suggest that absolutely, yes.

Q He just led police on a 19-minute chase. Right?

A Yes.

Q Disregarded commands?

A Yes, sir.

Q And he was wanted as well. Right?

A I don't know if he was wanted for any other offense

other than the fleeing and the striking of the squad car. I don't know if he was -- if that was known to the officers at the time, sir.

Q It's fair to categorize him as a violent criminal, though. Right?

A Yes.

Q Are officers trained to catch violent criminals?

A Yes.

Q Or are they trained to let them go?

A They are trained to do what they can to capture people who commit violent acts, but still within the framework of their training.

Q Is it preferred by the department that individuals such as Mr. Brown in those instances are caught or let free?

A Obviously, it is preferred that they are caught.

Q Again, going back to Mr. Davis being an innocent by-stander, we have this violent criminal trying to enter the house and, I believe, Officer Zens testified it looked like Mr. Davis was letting him in the house. Is that a crime?

A On its face, it could be interpreted as aiding and abetting, yes.

Q Aiding and abetting. So does that mean Mr. Davis was not such an innocent individual?

A It could be implied that he is committing an offense,

yes, a criminal act.

Q You were asked some questions about the greater danger exception. Do you remember that?

A Yes.

Q Is it the department's position that officers cannot miss?

A I am sorry?

Q If officers discharge their weapon, are they allowed to miss?

A Well, we understand that there is going to be situations that will cause an officer to miss, but obviously, it is our hope that when we deliver rounds, that they strike the intended target, but obviously, we have to take into consideration there are going to be misses.

Q So the officers don't always hit the intended target. Right?

A Yes, sir.

Q That is what happened here.

A Yes, sir.

Q Is there any doubt in your mind that Officer Zens was trying to hit Mr. Brown?

A I believe he intended to hit Mr. Brown.

Q Was Mr. Brown moving at the time that Officer Zens decided to shoot?

A That was difficult for me to determine in the body worn

camera at the exact time that the shot was fired.
Q Is it hard to hit someone that is moving?
A It is hard to hit someone that is moving.
Q Especially when it is dark out?
A Yes. That further makes it more difficult.
Q You were asked some questions about whether Officer Zens was concerned with Mr. Davis's safety. Right?
A Yes, sir.
Q Was Officer Zens more concerned with his safety?
A It appeared that way.
Q Does that trump Mr. Davis's safety?
A That is a subjective answer -- or question. My position is that an innocent bystander's life should be held to the same level or degree of importance as that of an officer's.
Q So in this situation, I want you to assume Mr. Brown had a gun and when he turned around, he actually fired at Officer Zens. Officer Zens should have taken that round to ensure that he didn't hit Mr. Brown unintentionally or -- or Mr. Davis unintentionally. Is that your position today?
A That is not what happened.
Q I'm not asking what happened. I want you to assume that is what did happen.
A If Officer Zens is actively taking fire, I would fully

expect him to return fire.

Q So really, this boils down to the fact that because it turned out that Brown didn't have a gun, it made it wrong for Officer Zens to discharge his weapon toward Brown. Is that what you are saying?

A That is not what I am saying.

Q Explain it to me Monday morning quarterbacking here. We are saying yeah, we don't want Zens to take rounds, but we are also saying because he did take rounds, this is a problem.

A Our -- our -- our point is -- or stand is that he observed a person standing in very close proximity, in his own words, stacked up on top of each other. And he still elected to discharge his weapon.

Q My question --

A Target isolation.

Q And my question is, why isn't he allowed to do that?

A There is a harm to injuring or killing or causing great bodily harm or death to an innocent bystander.

Q So it goes back to my first question, Inspector. I want you to assume that Mr. Brown did have a gun and did fire it. Would it be preferred that Officer Zens take that round?

MR. PEDERSON: Objection. Asked and answered.

MR. MATTHEWS: He never answered it.

MR. KONRAD: This is cross-examination and it, kind of, goes to the heart of the case, so let him continue.

A Can you repeat the question?

Q Sure. I want you to assume that Mr. Brown ended up having a gun in his hands and that when he turned around in the manner described by Officer Zens, that he discharged a round at Officer Zens. Is it the department's position that Officer Zens should have taken that round instead of discharging his weapon like he did?

A That is -- We would not want him to take that round, obviously.

Q Going back to what I said before, aren't officers allowed to be mistaken that an individual has a gun?

A No. Sorry. No, we don't allow them to mistake that, but we accept that it happens, we consider it. I just wanted to clarify that.

Q I am just looking at the firearms guide, which is Exhibit 4. It specifically says,

"If a suspect points a pistol at you, you are justified in using deadly force. If it turns out later that the suspect's gun was unloaded, that does not make your decision unjustified. Your perception of the threat was reasonable, under the circumstances."

MS. MC KENZIE: I'm sorry. What page?

MR. MATTHEWS: Firearms manual, Exhibit 4, Page 54. "Totality of Circumstances."

MS. MC KENZIE: Thank you.

BY MR. MATTHEWS:

Q You are familiar with that information. Right, Inspector?

A Yes, I am.

Q And you would agree with me that is what happened in this case. Right?

A Yes. There was a mistake made.

Q And you'd agree with me that Officer Zens' threat -- or perception of threat was reasonable. Right?

A Under the circumstances, it was reasonable.

Q But it was unreasonable for him to shoot is the department's position. Is that what you are saying?

A Under the totality of circumstances, that was our determination.

Q A lot of your testimony focused on the metering. Right?

A It did.

Q I am going to paraphrase here and tell me if I've got this correct. You said basically, that under the totality of the circumstances, if Officer Zens would have followed his training and actually metered the

corner, then this might not have happened. Right?
A That is correct.
Q So it sounded to me like the biggest issue in this case was the failure to meter.
A That was one of the issues.
Q Well, if the failure to meter doesn't occur, then we probably don't have the shooting was your testimony.
A That is a working belief with us, yes.
Q So he was discharged -- Officer Zens was discharged for the target isolation and 20 days for the metering. Right?
A Yes.
Q So if the failure to meter was more important, why did it only get 20 days?
A We consider the degree --
MR. PEDERSON: Objection. That is a Phase 2 issue.
MR. MATTHEWS: He was asking Phase 2 questions the entire time.
MR. KONRAD: We haven't had a strict line between those two. Go ahead.
BY MR. MATTHEWS:
Q Why was it only given 20 days?
A Degree of harm of the offense.
Q So the degree of harm -- Again, if I am understanding

your testimony -- which I am having trouble understanding -- if the metering was more important and if he would have metered, there wouldn't have been a shooting probably, then isn't the degree of harm there that it led to a shooting which led to an innocent person getting shot?

A I can't -- It is difficult for me to compare an improper metering to shooting an innocent bystander. Those are not comparable to degree of harm.

MR. KONRAD: He is impeaching the witness's testimony by bringing up the 20 days. What he is trying to say is if the metering caused the shooting, that is really consistent with the 20 days, so it is a form of an impeachment.

Go ahead, Mr. Matthews.

BY MR. MATTHEWS:

Q Inspector, I have known you for a while. You used to be a detective. Right?

A That is correct.

Q And do detectives have special training?

A Yes.

Q And so they do investigations. Right?

A Yes, sir.

Q So a police officer, if they get an investigation that they can't handle, they give it to detectives. Right?

A Generally.
Q Why do detectives handle it?
A To go along with what you said; they have specialized training and skill sets.
Q You are familiar with Sensitive Crimes. Right?
A Yes.
Q Do they have specialized training?
A Yes.
Q What kind of specialized training do they have?
A They focus on sexual assault type crimes, crimes against children, those sorts of criminal cases.
Q So even when you were a detective, if you came across one of those types of cases, you'd give it to Sensitive Crimes. Right?
A Typically, I would, yes.
Q You would defer to their expertise. Right?
A Yes.
Q Same thing; the department has a crash reconstruction group. Right?
A Yes.
Q What do those people do?
A They investigate serious and fatal motor vehicle accidents.
Q So an officer on the street, if they came across one of those, they don't investigate it themselves. Right?

A Generally, not.
Q They would give it to the CRU. Right?
A Yes.
Q Those people have the expertise.
A Yes.
Q They would defer to the people that have that expertise. Right?
A Yes, sir.
Q The department has firearms instructors. Right?
A Yes, sir.
Q And they have one that is the range master. Right?
A Yes.
Q And that individual is a master instructor trainer. Right?
A Yes.
Q And he is the only one in the department with that designation. Right?
A Yes, sir.
Q So generally, people would defer to him in firearms situations. Right?
A Yes, sir.
Q That is not what happened here, though. Right?
A That is correct.
Q He was asked for his opinion, though. Right?
A He was.

Q And he gave it. Right?
A Yes.
Q But no one deferred to it.
A It was reviewed and considered.
Q No one deferred to his opinion. Right?
A Correct.
Q Would you agree with me that is similar to an officer saying, "I don't care what the crash reconstruction unit is going to do with it; I am going to do it myself"?
A I don't think those two are similar.
Q You testified that certain units have certain expertise. Right?
A Yes.
Q The reason that the people with the expertise work in that area is because they have that expertise. Right?
A Yes, sir.
Q And that is why they are utilized in those situations.
A Yes.
Q But in this situation, the person with the expertise wasn't utilized. Right?
A Yes, sir, my point is you are comparing a police officer to that of the chief of police.
Q Let's go to that. The chief of police can make any decision he wants. Right?

A He is the chief executive officer of the agency, so he generally renders decisions for the department.
Q My question is, if the chief decided that the sky was brown, he could make that decision. Right?
A In theory, yes.
Q In this case, he can make any decision he wants. Right?
A Yes.
Q That doesn't make it reasonable, though.
A Again, that is subjective.
Q I am asking you. That doesn't make it reasonable just because he made a decision.
A It could and it could not be.
Q Are you aware of 62.50 of the Wisconsin Statutes?
A Not intimately, no.
Q Are you aware of the fact that they guide disciplinary proceedings with respect to sworn police officers?
A That is correct.
Q Do you know if 62.50 was reviewed during the meeting with the chief?
A Not in my presence, it was not.
Q Were you not present for the entire meeting?
A I was present for -- There were multiple meetings on this and I was only present for two of them. There were meetings that occurred prior to my assignment to the acting assistant chief position.

Q When you were a detective and you got a situation that you knew was in the purview of Sensitive Crimes, you would ask Sensitive Crimes to handle the matter. Is that right?
A Not as a detective. My supervisor would.
Q Your supervisor would hand it off to Sensitive Crimes. Right? Or the time when you were a lieutenant. When you were a lieutenant, you would come across a situation that should go to Sensitive Crimes. Right?
A Generally, but there is always exceptions.
Q So you didn't take what Sensitive Crimes gave you when they finished and give it back to your detectives under your command and say, "hey, I want you to do something else here." Right?
A Generally not, no.
Q Well, generally not or no?
A There are exceptions. There are times when we have had to have detectives and they want it to go to Sensitives Crimes, there is occasions where we had homicide detectives take over, assist in a sexual assault investigations. There are exceptions to the analogy that you are trying to make here, sir.
Q You mentioned there were multiple meetings on Officer Zens. How many meetings were there?
A To my knowledge, there was two, but I know from conver-

sations with the other people that were present at the time, there were other meetings before my arrival to the seventh floor. I don't know how many.

Q You are saying there was one meeting on July 28, 2020.

A That was -- I believe that was the date that discipline was rendered.

Q But there were meetings before that.

A Yes.

Q Are you aware of any record of those meetings?

A I am not personally. That would have to be answered by Internal Affairs.

MR. MATTHEWS: That is all the questions I have for you. Thank you.

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: Yes, thank you.

REDIRECT EXAMINATION BY MR. PEDERSON:

Q You were asked some questions about metering a doorway. Do you recall those questions?

A I do.

Q Was Officer Zens disciplined for failing to meter a doorway?

A No, he was not.

Q What was he disciplined for regarding metering?

A He was disciplined for failing to meter the corner when he lost sight of the person he was chasing prior

to arriving at the doorway.

Q You were asked some questions regarding whether a reasonable officer in Zens' position might think that Mr. Davis was perhaps aiding and abetting or harboring. Do you recall those questions?

A I do.

Q As a follow-up, do you believe that Officer Zens had a significant reasonable consideration that Mr. Brown might take hostages in that house?

A I don't believe he had reasonable grounds -- I don't believe he had reason to suspect that there would be a hostage situation.

Q Why not?

A In Officer Zens' statement -- and I can't recollect if it was during the PI-21 or during his interview regarding the critical incident with detectives -- but he indicated he observed Mr. Brown using a cellular phone while driving and that it was his belief that he was probably calling for someone to assist him, let him into a house, something to that effect.

Q You were asked some questions regarding whether you agreed that officers are allowed to miss. Do you recall that testimony?

A Yes.

Q Does that fact relate to the requirement of target

isolation?

A Yes.

Q How?

A The failure to recognize target isolation exacerbates the fact that if the officer misses, someone is going to get hurt, endangering -- or an innocent bystander's life is in danger.

Q You were also asked questions about the additional circumstances here; Brown was moving, it was dark, those other issues. Do you recall that testimony?

A I do.

Q Does that also relate to the issue of target isolation?

A Yes.

Q How so?

A If you can't see what is behind your target, that should be a concern. The same with the moving target. There is more -- you are more likely to miss.

Q Is the chief required to defer to his subordinates?

A No, he is not.

Q Are there times where a chief might defer to his subordinates?

A Yes.

Q Are there times where the chief might not?

A Yes.

Q How do you reconcile or how does the chief determine

when it is appropriate and when it is not?

A Like I stated previously, he is the chief executive officer of the agency. Ultimately, he renders final decisions in such matters.

MR. PEDERSON: That is all I have for redirect.

MR. KONRAD: Mr. Matthews?

MR. MATTHEWS: No.

MR. KONRAD: Do the commissioners have any questions?

I have a question on this rule about losing sight and suggesting -- or guidelines say you should meter, other circumstances, I guess. This half a second, is that really losing sight?

THE WITNESS: Technically, it is, but again, but that comes to the -- the issues of everything and that if you suspect that somebody is armed, you should be also increasing your distance so that you have a reaction time.

MR. KONRAD: I was thinking -- I can't think of a chase where an officer wouldn't take his eyes off for half a second, or many reasons. Just to go up three stairs, you look down for half a second, but there is no clear definition of what "losing sight" means. Is that correct?

THE WITNESS: That is correct, sir.

MR. KONRAD: Any further questions?

MR. PEDERSON: None.

MR. MATTHEWS: I have one on that point.

RECROSS-EXAMINATION BY MR. MATTHEWS:

Q Inspector, I believe you just said, in response to the hearing examiner's question, technically, it is losing sight, you want to be creating a gap. Right?

A Especially when you believe or know that somebody is armed, yes.

Q Just so I understand, in a foot pursuit, what is the main objective?

A The main objective is to safely apprehend the person trying to flee or fleeing from you.

Q So if someone is fleeing from you, do you want to let them get more distance from you or do you want to close the distance on them?

A At times, it may be appropriate to let that distance increase and then there are other options that are available to you such as setting up containment.

Q So is it your position today that the officers of the Milwaukee Police Department are trained that when they get into a foot pursuit, instead of trying to gain on

the individual so they can eventually apprehend them, they need to create more distance?

A If you suspect or know that they are armed with a weapon and they are trying to acquire target acquisition on you, you should be seeking cover and increasing distance.

MR. MATTHEWS: That is all I have.

MR. PEDERSON: Nothing.

MR. KONRAD: Commissioners?

Thank you.

(Witness excused)

MR. PEDERSON: With that, the chief would rest in Phase 1.

MR. KONRAD: Thank you, Mr. Pederson.

Mr. Matthews?

MR. MATTHEWS: We make a motion to dismiss, as the chief hasn't met his burden here. It is really not close, as far as I'm concerned. There is no evidence discovered that Officer Zens failed to follow the state's guidance on target isolation. There is absolutely no evidence that the greater danger exception doesn't apply here. And it's described in the charges, which is what matters. If you look at the charges, it specifically says -- that's Exhibit 14 and Exhibit 15 --

looking first at Exhibit 14, on the page marked Page 9 under "Specifications," -- I will wait for Commissioner McKenzie.

MS. MC KENZIE: You said Exhibit 14?

MR. MATTHEWS: Exhibit 14, it is numbered Page 9. Second-to-the-last page. 62.50(5) says,

"Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate."

Looking at the Charges, it says,

"Officer Zens failed to adhere to policy when he failed to meet the deadly force requirement of target isolation."

So that is how it is listed in the charges. There is not substantial evidence that he failed to meet the deadly force requirement of target isolation because, number one, you don't need target isolation. That is where the greater danger exception comes into play. And even if there is some evidence that the greater danger exception shouldn't come into play, there was not substantial evidence that it does not come into play. Every single person that is a use of force expert that looked at this said the greater danger exception applies

and Officer Zens' beliefs were reasonable. The threat he perceived was reasonable. Even Inspector Formolo didn't get it right today. You saw that on the stand. He was going back and forth; yeah, okay, it wasn't right because he didn't have a gun, but yeah, it would have been right if he did have a gun. That doesn't make sense. The training guides specifically say that an officer's threat -- their perception, as long as it is reasonable, is justified. So that is Exhibit 14.

Now, Exhibit 15, same thing; the second page of the charges, looking at Sub 5 of 62.50(17)(5), it says,

"Officer Zens failed to adhere to policy when he failed to stop and look for the suspect after losing sight of him."

That is not -- it is not a policy; it is a general guideline. Even Deputy City Attorney Pederson said it is steps you should take. At another point, he said not that you must; steps that you should take. So we are disciplining someone here for something that is not required in both charges. Both charges, not required. So how can you have evidence of something that is not required to be violated, let alone substantial evidence of that? You can't.

I mean, we can get into this more if the

Commission doesn't want to entertain this motion at this time, but the bottom line is everyone said, including Lieutenant Looney -- who will be called next, if necessary -- says the use of force was reasonable and justified. Well, what was the use of force? Discharging the weapon. So how can you say the use of force was reasonable and justified, but then say no, actually, it wasn't because there wasn't target isolation? You can't. You don't get both. It is one or the other. So if the use of force was not reasonable because he didn't have target isolation, okay, that makes sense, but that is not what we have here. We have the use of force was reasonable. So the only use of force was discharging the weapon.

So again, it cannot be sustained at this phase. The chief has not met his burden. There is no preponderance of the evidence here. And if you look at the investigation that was done -- and I use the term "investigation" loosely because the most important thing here was the greater danger exception, and you heard Sergeant Norberg testify. She never talked about it, she never mentioned it. It is not even in her report. It is not mentioned in the charges, it is not in her report, she didn't ask about it during the PI-21. The only thing she did in this entire case on her own was

the PI-21 and she didn't ask those questions. You heard the questions she asked today. "Weren't you concerned about Mr. Davis' safety?" But she didn't ask, "weren't you concerned about your own safety?" And that is what matters. The answer is yes and that is why the greater danger exception applies. That is why you don't need target isolation.

So I ask the Commission to deliberate on this because I think it is important and I really feel strongly that there is not substantial evidence of either violation, but you can't say that the use of force is reasonable and justified if a piece of the use of force is allegedly not reasonable and justified and outside of policy. Thank you.

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: I oppose the motion. I believe it fails to meet the burden here as it relates to metering. Yes, it is clear that officers have to use their own judgment in that there is totality of the circumstances consideration, but it is a tactic upon which they are trained, it is important, and they are expected to use it and I think it is clearly within the chief's authority to determine in review of particular circumstances in particular cases that if an officer failed to do that, that that constitutes a violation of

the policy. That is what it boils down to here. It is discretionary. It is a review of a discretionary decision, so I don't think that meets the burden here that that applies in dismissing this outright as a matter of law upon the evidence that we have here today and, to expand upon that point, we have an admission from Officer Zens himself that he was aware of the policy and that he did not follow the policy and that he probably should have.

So based upon all of those, I think there is plenty of evidence to demonstrate that there was a violation of the policy regarding metering.

On the failure to have a target isolation, again, essentially a very similar analysis. In the end, this boils down to the greater danger exception. Does it apply? Does it not? The chief has determined it has not. Just because that description does not appear in the specification of the charges, I don't think that is fatal in any degree whatsoever. The notice requirement does not require an exhaustive review of all of the evidence and everything here. There was reference to the target isolation policy and the greater danger exception is incorporated into that policy. So just because the specifications don't mention greater danger, I don't think that is fatal. I don't think that

should support the motion before you right now.

There's been plenty of testimony as to why the analysis took place regarding the chief, which is what is important, and there is evidence going the other way. That is what we are here for. I think there is plenty here to meet the burden as a prima facie matter to deny the motion.

MR. KONRAD: Thank you. I'm going ask that the Commission meet in closed session to discuss and deliberate over the motion.

Do we have a motion to go into closed session?

MS. MC KENZIE: So move.

MR. KONRAD: Do we have a second?

MR. COCROFT: Second.

MR. KONRAD: Any objections? Hearing no objection, we will go into closed session. Thank you.

(Closed session deliberations 9:50 - 10:20)

MR. KONRAD: Thank you. We are now -- It is 10:20 approximately. We are back in session. And I will hold the motion to dismiss in abeyance and proceed with the hearing.

Mr. Pederson?

MR. PEDERSON: I'm sorry. I didn't

catch what you said.

MR. KONRAD: We are holding the motion in abeyance and continuing with the hearing. Do you have another witness?

MR. PEDERSON: We don't. If you recall, the chief did rest in Phase 1 and has concluded its portion of the case.

MR. KONRAD: Are all your exhibits in evidence?

MR. PEDERSON: I don't believe they have been moved in. I can so move now, in addition to the CD if it has been marked yet or not, but yes, I would move all of the exhibits into evidence.

MR. KONRAD: You played a portion of the PI-21.

MR. PEDERSON: Yes. That is the CD I am referring to. I am not sure if that's been marked or not, but it is still is in the drive, I believe.

(USB and CD were marked as Exhibits 17 and 18)

MS. TRIGGS: It's Exhibit 18.

MS. MC KENZIE: What is the video marked as? Is that 19?

MS. TRIGGS: That's 17. And the CD rom that we just played the audio of the PI-21, that's 18.

LIAM LOONEY, having been first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth testified as follows:

MR. KONRAD: The witness is sworn.

DIRECT EXAMINATION BY MR. MATTHEWS:

Q Lieutenant, would you, please, your name and spell your last name for the record?

A Sure. Lieutenant Liam Looney. L-o-o-n-e-y.

Q How are you currently employed?

A I am a lieutenant with the Internal Affairs Division.

Q How long have you held that position?

A Since May of this year.

Q How long have you been a member of the police department?

A Since April of 2002.

Q Prior to becoming a lieutenant, were you a sergeant?

A I was.

Q Prior to becoming sergeant, were you a police officer?

A I was.

Q When was the last time you were a police officer on the street?

A The last time I was on the street, I was a police officer. The last time on the street would be approximately March of 2006.

Q Are you a DAAT instructor?

A I am not.
Q Are you a firearms instructor?
A I am not.
Q Have you ever been any of those?
A I was a firearms instructor. I believe I went through the firearms instructor course in, I believe it was May of 2011.
Q And when was the last time you were certified?
A It's been a few years. I don't remember the last -- the last year I was certified.
Q Did you do anything as a firearms instructor?
A I was an adjunct instructor, so my role was not full time at the academy. I'd help out at in-service and shoots and things like that.
Q Have you ever been a tactical response instructor?
A I have not.
Q You'd agree with me you have less expertise in those fields than Sergeant Groszczyk. Right?
A That would be accurate, yes.
Q You have less expertise in those fields than Bob Willis. Right?
A I would imagine.
Q Have you ever been in a foot pursuit?
A I have.
Q How many?

A It's been so long, I don't know if I could give you an accurate answer on that. A handful. Not a lot in my career.
Q Maybe 15 years ago the last time?
A Most likely.
Q Did you ever lose sight of the person you were chasing?
A I can't -- I don't know. It's been so long, I don't remember what the last foot chase was. I can't accurately answer that.
Q You never worked on the street as a police officer with a body camera. Right?
A No, I did not.
Q You would agree with me, as someone who has worked in Internal Affairs, that it is the best practice for individuals with specialized expertise to perform investigations within that field. Right?
A It is ideal.
Q Because they are the ones most qualified to render opinions and do investigations on it. Right?
A That is accurate.
(A document was marked as Exhibit 19)
Q Lieutenant, you have in front of you a document that's been marked as Exhibit 19. Have you seen that document before?
A Yes.

Q What is it?
A It is the lieutenant's cover from me to Captain Kavanaugh regarding misconduct by and recommendations to prefer charges against the member.
Q The member being Officer Zens. Right?
A Yes.
Q It's dated July 13, 2020?
A Yes.
Q It is a five-page report?
A Yes.
Q Is this the only work that you performed in this case?
A Yes.
Q Generally, the lieutenant's cover is ghost written by the investigating sergeant. Is that correct?
A Generally, yes.
Q Is that the case in this case?
A Yes.
Q This document was actually drafted by Sergeant Norberg?
A I believe so. I believe so, yes. Then I reviewed the materials, made corrections and signed it.
Q It ultimately bears your signature. Right?
A Yes.
Q It is your report. Right?
A Yes.
Q I want to turn your attention to the second page, half-

way down. Do you see the paragraph that begins with "at the moment he fired"?

A Yes, sir.

Q It says,

"At the moment he fired, Officer Zens believed he was facing a suspect drawing a firearm."

Right?

A Yes.

Q And you had no reason to doubt that statement. Right?

A At the time -- No, I don't.

Q That is what you put in your report. Right?

A Yes.

Q And you continue, two sentences down.

"Mr. Brown had the ability to draw a weapon and present a threat to Officer Zens and show danger signs of someone potentially armed."

Right?

A Yes.

Q And then,

"All reasonable attempts to stop Mr. Brown, and gain his compliance, had failed."

Right?

A Yes, sir.

Q Those are your words.

A Yes.

Q There is no reason to doubt your words. Right?
A No.
Q You continue on, you summarize what Sergeant Groszczyk concluded. Right?
A Yes.
Q Including his statement,

"Officer Zens responded with a reasonable amount of force to the threat he perceived and moved to stabilize the same consistent with his training."

Right?
A That is accurate based on the memorandum -- yes, the memorandum offered by Sergeant Groszczyk.
Q Turning to the next page, again, about halfway down, there's a paragraph that begins with "Based on the aforementioned." Do you see that?
A Yes.
Q It says,

"Based on the aforementioned, there is no preponderance of evidence present to support an allegation that Officer Zens' use of force was unjustified. Therefore, with your permission, I respectfully request that the allegation be filed as exonerated and I recommend this case be placed on file pending any further information."

Is that what it says?

A Yes.
Q Just so I am clear, what use of force was that?
A The actual, I believe, discharging of the firearm.
Q Did Officer Zens use any other force?
A No.
Q The only use of force was the use of a firearm. Right?
A Yes, sir.
Q You said he was justified to discharge his weapon. Right?
A Yes.
Q When someone is justified to discharge their weapon, does that include all the target requirements?
A Well, I -- I think in this case, looking at the reason why he wound up discharging was because of his articulation that he believed the individual was armed. I think -- obviously, we are going to get to it -- the crux of the case is whether or not the target isolation was met, but at the moment he discharged his firearm, based on his statements and beliefs, it was determined that that was exonerated, yes.
Q Let me ask you this. Are you familiar with the testimony from Monday?
A I saw just very little. I'm sorry.
Q With respect to discharging a weapon, there is target requirements. Right?

A Yes.
Q So in order for discharge of a weapon to be justified and the use of force investigation be exonerated, you have to be -- it has to be reasonable. Right?
A Yes.
Q So you found that the use of -- Officer Zens' use of his weapon, his use of force was reasonable. Right?
A Yes.
Q It wasn't unjustified.
A No.
Q And you exonerated him for that.
A Yes.
Q And now, just so I understand it, the whole use of force, which is discharging his weapon at the suspect, was justified, but a piece of it is not justified. Is that what you are saying?
A Yes.
Q Doesn't that directly contradict each other?
A I don't think so.
Q Explain.
A Well, this case obviously is unique and unfortunately, I also -- this was a case I inherited upon my transfer to Internal Affairs because the vast majority of this was done prior to my transfer to the Internal Affairs Division. So when we were reviewing this case, there

was concern, based on the statements that I believe we previously listened to in his PI-21 about -- about the target isolation. He made a comment in his PI-21 to Sergeant Norberg that he didn't have target isolation in regard to Mr. Tari Davis and later on, Sergeant Norberg asked him if he was concerned for Mr. Davis' safety and I am not using exact words, but I believe the statement was no. So it was looked at that while -- when he decided to pull the trigger, he believed, by his own statements, that he believed that -- that Mr. Brown was -- and I am just again paraphrasing from what I recall -- that he made a sudden motion and Officer Zens believed that he may have been armed and was going to present to fire and he fired. So that is why I recommended the exoneration on actually pulling the trigger at that moment, but when we discussed this case just --

Q Let me stop you there. So you agree that he should be exonerated based on pulling the trigger at that moment.

A Yes, sir.

Q Would you agree with me that at that moment, Officer Zens didn't have target isolation?

A Yes.

Q And Officer Zens isn't required to have target isolation because there is an exception. Right?

A I don't know for sure, but I know there is -- there can be exceptions, yes.
Q There is no -- You didn't list out the greater danger exception in your report explicitly. Right?
A I don't believe so.
Q You quote a piece from the firearms guide that mentions the greater danger exception, but you don't say what the greater danger exception is. Right?
A That is accurate, based on what is in the report.
Q Do you know if Sergeant Norberg uncovered any evidence that Officer Zens failed to meet the greater danger exception?
A I don't believe it was discussed.
Q So she didn't even ask him about it. Right?
A No.
Q In other words, when she was asking those questions about Mr. Davis' safety and whether Officer Zens was concerned for it, the logical follow-up would have been "were you concerned for your own safety?" Right?
A That could be a question asked. You know, also, during that, when Officer Zens was giving his explanation, you know, the member or his representative can also raise that fact, which wasn't raised, but yes, it could have been asked.
MR. KONRAD: Just for the record,

he said it happened -- things happen so fast, he wasn't concerned over the presence of Davis. He didn't say "I wasn't concerned about the presence of Davis." He said, "things happened so fast."

THE WITNESS: That is probably correct.

MR. KONRAD: That is what I recall.

THE WITNESS: I am sure that was accurate.

BY MR. MATTHEWS:

Q So you'd agree with me that she didn't uncover any evidence of the greater danger exception not applying. Right?

A Not to my knowledge, no.

Q She is the only one who investigated. Right?

A Yes.

Q Are you familiar with the provisions of the greater danger exception?

A It's not in my head right now, no.

Q But when you wrote your report, you were?

A Yes, because we referred to the DAAT manual and firearms manual.

Q Whose call was it to go against Sergeant Groszczyk's recommendation here?

A Like I said, when this case was revisited sometime in

June -- end of June, beginning of July, I -- prior to my transfer to Internal Affairs Division, I wasn't really familiar with this case, so I had not really even heard of it, but it had been open for a while, so we were directed that we needed to get this case closed. There was conversations when I first started reading this case and watching the body cam video that based on the statements that Officer Zens gave in his PI-21, that these were the appropriate charges to sustain.

Q So would you agree with me that if the greater danger exception did not apply, you should put that in your report. Right?

A Can you repeat that?

Q I am asking if the greater danger exception did not apply, then you should have put that in your report. Right?

A I will agree with that, sure.

Q Because SOP 450, which you are familiar with. Right?

A Yes.

Q It says you have to be specific. Right?

A Yes.

Q And that is consistent with the Code of Conduct, too. Right?

A Yes, sir.

Q And don't you owe that to Officer Zens with his life and

future on the line?
A Of course.
Q Did Officer Zens take any steps in your investigation to attempt to minimize the chance of hitting an innocent person?
A Not that I -- I mean, this was a very fast, fluid and dynamic situation. I think when I watched the -- reviewed the body cam video, I don't remember off the top of my head now, but the moment that he stepped out of the squad to the time that the shot was fired is a very quick time frame.
Q Let me ask this, maybe be a little more direct for you. I apologize for that. He didn't blindly fire rounds at anybody, right?
A No.
Q How many rounds did he fire?
A One.
Q That shows great restraint. Right?
A He did, yes. He did what he was trained to do, stop and fire until the threat was ceased.
Q He aimed at Brown. Right?
A That is what his statement was, yes.
Q Do you have any reason to believe that that is not true?
A Absolutely not.
Q Did Brown move?

A I believe in watching that video, there was -- from my recollection of watching the video, Mr. Brown was attempting to get into the residence, Mr. Davis was attempting to keep him out, and there was some -- I believe initially, Mr. Brown's back was to Officer Zens and at some point, he turned around, so yes, there was movement.

Q It is hard to hit a moving target. Right?

A Sure.

Q Yes or no?

A Yes.

Q Brown was a moving target. Right?

A I think that is accurate.

Q This is a fluid, dynamic situation. Right?

A Absolutely.

Q Do you recall if you put anything in your report that Officer Zens' intent was to stop the threat of significant harm?

A I don't recall if I reviewed it. Could you repeat your question?

Q Do you recall if you put in your report that it was Officer Zens' intent to stop the threat of significant harm? It is on Page 36, the second paragraph down.

A 36?

Q Yes, sir. Page 4 of 5, numbered Page 36.

A Are you talking about my cover? What page? I got it.
Q Those are your words. Right?
A Yes.
Q Second paragraph down, second sentence.
"Officer Zens intent was to shoot Mr. Brown to stop the threat of significant harm."
Right?
A Yes, sir.
Q What was the significant harm?
A His belief at the time that Mr. Brown was armed with a firearm.
Q So the significant harm was to Officer Zens. Right?
A Yes.
Q That he would be shot or killed. Right?
A Yes.
Q And that is part of the greater danger exception.
Right?
A I believe so, yes.
Q That is what makes Officer Zen's actions not unreasonable. Right?
A At the time of the discharging his weapon, he reasonably did believe that Mr. Brown may have been armed and again, that is why he was exonerated on the actual use of force.
Q So his actions were not unlawful. Right?

A No.
Q They weren't in violation of policy.
A The discharge of the firearm?
Q Right.
A No. The discharge of the firearm, no.
Q Not a violation of his training. Right?
A No.
Q I saw you put your hand up, kind of, like this, like, I-am-not-sure motion.
A No. I mean -- Yes, his use of force, when he pulled the trigger, yes, was within policy.
Q I guess, what I was asking is, with that hand motion, it's kind of, like, you are not sure because you are not an expert in that area. Right?
A I am not an expert in the area.
Q And you know officers can miss even if they have target isolation. Right?
A It does occur.
Q At the critical moment when Officer Zens discharged his weapon, did he have a chance to move rather than getting shot at?
A Again, the situation was very fast moving and from the time that I think he encountered Mr. Brown at the door to the time he fired was probably less than a second, so it is hard for me to accurately say if he could have

moved out of the line of fire had Mr. Brown been armed, but certainly, had Mr. Brown been armed with a firearm, that would have happened very fast.

Q Officers aren't trained to take that chance. Right?

A I am sorry?

Q To take the chance to wait, to make sure it is a fire-arm. Right?

A No. If they can reasonably articulate why they fear for their safety and why they discharged the firearm, then yes, they are privileged to use force.

Q And that is what happened here. Right?

A Yes.

Q Turning to Page 3 of 5 of your report, which is No. 35 in the right corner, you'd agree with me that you didn't find any specific facts as part of your investigation that Officer Zens violated the state's guidance on target isolation. Right?

A Can you repeat that?

Q Would you agree with me that you didn't find any specific fact as part of your investigation that Officer Zens violated the state's guidance on target isolation?

A Well, we did find that he did violate that because we determined that at the time that he did fire, he did not have target isolation on Mr. Davis -- I'm sorry, Mr. Brown based on his statements.

Q Did you also incorporate the greater danger exception to that analysis?
A I don't believe it is in here, no.
Q Would you agree with me that that is part of the analysis when you are looking at target isolation, though. Right?
A Yes. I mean, there is a lot of things that do go into effect when an officer uses force.
Q On Page 3 in the middle, it says,
"There is concern in regard to Officer Zens' use of force and lack of the three required elements for a deadly force where isolation is of concern."
Do you see that?
A Yes.
Q You wrote that. Right?
A Yes.
Q You would agree with me that there are three required elements for deadly force. Right?
A I'm sorry?
Q You would agree with me there are three required elements for using deadly force. Right.
A Yes. Acquisition, identification and -- acquisition, identification, and isolation.
Q So you believe they are all -- you need to have all three, that they are required.

A Yes.
Q Are there any exceptions?
A There can be, yes, with the greater danger.
Q So three required elements plus an exception. Right?
A Yes.
Q In this case, the exception would have come into play possibly. Right?
A It is possible, yes.
Q Did you uncover any information that Officer Zens' perception that he thought he was going to be shot at was unreasonable?
A No.
Q At any point, did you think he was being untruthful?
A No.
Q The greater danger exception includes harm to yourself. Right?
A I believe so.
Q You recall they were about five to ten feet from each other?
A They were in close proximity.
Q As you, kind of, alluded to before, you got to Internal Affairs and then you were told to finish up this investigation. Right?
A Yes.
Q Who told you that?

A At the time, Captain Kavanaugh. The case had been open since -- September of 2019. Usually, with critical incidents, they take longer just because of the nature of them, the amount of people that get interviewed, the amount of reports generated and this case was -- was getting older, so yes, there was discussion that we needed to get this case closed out because it was several months old, I guess you could say at the time.

Q Was there any discussion about reaching a certain result in this case?

A No, not to me.

Q So if that took place, you are not aware of it.

A I am not aware, no.

MR. MATTHEWS: That is all I have. Thank you.

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: Thank you.

CROSS-EXAMINATION BY MR. PEDERSON:

Q As part of your piece in this investigation, you had an opportunity to actually take a look at and review the applicable training manuals. Right?

A Yes.

Q You also looked at the actual content as it relates to target isolation, I assume?

A Yes.

Q Are you familiar with the example in target isolation where it talks about if a person ran out from a building, who shot at officers and ran into a crowd, that would not be target isolation and they couldn't shoot.

A That is an example given in the manual, yes.

Q And with the greater danger exception, are you familiar with the example where it says that, as an exception, if a person -- deranged person was in a crowd firing at people, that then, under those circumstances, the greater danger exception might apply such that target isolation wouldn't be required. Are you familiar with that example?

A Yes.

Q Would you agree with me those are two extreme examples to illustrate either point of the issue?

A They are extreme examples, yes.

Q In your experience, do most shootings fall into those sort of extreme categories?

A Generally, no.

Q Does this shooting fall into one of those extreme categories?

A Extreme? No.

Q How would you characterize where in that spectrum this particular shooting involving Zens falls?

MR. MATTHEWS: I would object. He is not an expert in this. He looked at the document, it is no different than anybody else.

MR. KONRAD: It is cross-examination, so we will give him some leeway.

A Could you repeat it? I'm sorry.

Q I am just asking you, on that spectrum where we have established two extremes, is there somewhere in that spectrum you feel comfortable indicating where this might fall?

A Somewhere in the middle.

Q Okay. And would you agree with me, then, that you exercised your own discretion in determining whether or not target isolation was an issue here?

A Yes.

Q Is that a point upon which reasonable minds can differ?

A Of course, yes.

Q Does that analysis require the exercise of discretion?

A Yes.

Q In exercising discretion, is it appropriate to review thoroughly investigations as to the input of others?

A Yes.

MR. PEDERSON: That is all I have.

MR. KONRAD: Mr. Matthews?

MR. MATTHEWS: Nothing.

MR. KONRAD: Commissioners? No questions.

MR. PEDERSON: I think --

MR. KONRAD: Mr. Cocroft?

MR. COCROFT: I have one question. This goes back to, like, when the officer had said, "show your F'g hands" and then when somebody showed their hands, it was less than half a second, he didn't have a chance to even look at the person's hands or just did he turn around and shot in order to show his hands? That bothered me.

THE WITNESS: Is that a question for me?

MR. PEDERSON: I think the witness needs clarification on that question.

MR. COCROFT: What I am asking is, is it reasonable to give a suspect, like, a second, a half a second to show their hands, because it seems like you're trying -- I am just saying -- you give them an order, is that -- you can shoot right away or give them an opportunity to show their hands, to comply?

THE WITNESS: That is a difficult question to answer because when you look at a situation where an officer believes somebody is armed, in this situation, I believe Officer Zens' statement to both

detectives and to Sergeant Norberg was he believed that Mr. Brown was armed based on characteristics that he was displaying by concealing his hands, I believe, to be in his waistband. So when he got to the door and he was giving the command to "show me your hands", Mr. Brown suddenly turned around and it is reasonable to -- And that is why we found it exonerated, the actual shooting, because a person can turn around within a half a second and have a firearm displayed. So it is a difficult question for me to answer, sir, whether it is appropriate or not because it is such a fast, dynamic situation when an officer is facing somebody that they believed is armed. I don't think there is any kind of time frame that I can put on that is appropriate from the time he says "show me your hands" to the time he fired. I can't -- I can't answer that question. I am sorry.

MR. COCROFT: Just a follow-up. Instead of saying "show me your hands," if he said, "put your hands up" so that he is not facing him, but still, as he turns around, makes a motion, I think involved in that situation, I might fire as well. But "show me your hands" is, kind of -- you know, it is not specific enough. So maybe that should be added to training.

And Commissioner Crouther has a question as well.

MR. KONRAD: Yes, Commissioner.

MR. CROUTHER: I don't see in your report how far Mr. Brown was chased.

THE WITNESS: I apologize if that's not in there. I believe, based on the interview and the report authored by Sergeant Norberg, I believe it was estimated to be within ten feet.

MR. KONRAD: Is the question how far was he chased or was the question how far was he behind?

THE WITNESS: I assume it was how far --

Mr. Crouther, could you please clarify that? If I may ask --

MR. CROUTHER: I believe the first question was, how far he was chased and if he was chased, were his hands in his pockets?

THE WITNESS: I don't recall how far the foot chase lasted. I believe on body cam video, it was only a matter of a couple of seconds. I couldn't estimate how far it was. I don't recall in the report. It was not a long foot chase, probably a hundred yards or so possibly, but again, that is speculating on my

part. It was a short foot chase. It was not -- A lot of foot chases can go on for some time, they can go blocks. This one was short in duration. I don't know the length. I am sorry.

MR. CROUTHER: Did he have his hands in his pockets while he was running?

THE WITNESS: I believe that was Officer Zens' testimony, that he believed Mr. Brown was concealing his hands in -- I don't recall specifically right now if his testimony was it was in his pants or in his shirt, but I do -- he did testify that he believed that Mr. Brown's hands were concealed.

MR. KONRAD: To further ask the question --

MR. CROUTHER: You ought to know whether a person is pulling up their pants or if they are carrying a weapon. Is there training for that? And not that you are -- Is there training for a person to know whether they are carrying any weapons or whether they are really --

THE WITNESS: If I understand your question, I believe you asked, was it assumed that he could have had a weapon based on the way his hands were concealed? That is what Officer Zens articulated. I have no reason to doubt his belief, if that is your

question.

MR. KONRAD: I think I can clarify the point. In Exhibit 2, which is the district attorney's letter, they say that Mr. Brown admitted in two separate police interviews that he did, in fact, have his hands in his front waistband area as he ran from Zens and then also, Exhibit 9 states on Page 52, during an interview, that Mr. Brown stated that he put his cell phone away in his pocket during the foot chase. He could not specifically recall where his hands were when the shots were fired. So there is more evidence on the issue -- or there is evidence on the issue in addition to the officer's statements.

Any further questions?

MS. MC KENZIE: I have a question. So since you have been in this position within IA, how many of these types of documents have you prepared, these memos?

THE WITNESS: Maybe two, three dozen.

MS. MC KENZIE: Okay. So in your experience, when determining whether allegations of misconduct have been sustained, how many allegations have been based upon training guidelines?

THE WITNESS: In my recollection,

this is the only one I have seen personally.

MS. MC KENZIE: I have nothing further.

MR. KONRAD: Any further questions? There are no more questions.

Thank you.

(Witness excused)

MR. KONRAD: Any further witnesses?

MR. MATTHEWS: We call Robert Willis.

ROBERT WILLIS, having been first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth testified as follows:

MR. KONRAD: The witness is sworn.

(A document was marked as Exhibit 20)

DIRECT EXAMINATION BY MR. MATTHEWS:

Q Can you, please, state your name, and spell your last name for the record?

A My name is Robert C -- for Charles -- last name is Willis. W-i-l-l-i-s. Most people call me "Bob."

Q Mr. Willis, I have placed in front of you what's been marked as Exhibit 20. Have you seen that document before?

A Yes, in general. It is the first time I have seen this

today, but this is my CV. Yes, I have seen this before. Not this particular one.

Q It is a 60-page document that I've spared everyone by putting on front and back. It is only 30 pages long. Right?

A Yes.

Q If you turn to the -- to Page 2 through Page 6, it references your relevant training and experience with respect to law enforcement?

A Two through six is a --

MR. COCROFT: Examiner, we can't hear the attorney. We didn't hear the question.

MR. MATTHEWS: I'm just going over Pages 2 through 6 in the CV.

MR. KONRAD: Can you hear him now? Would you say that again?

MR. MATTHEWS: Can you hear me, Commissioner?

MR. KONRAD: He is waving.

MS. TRIGGS: He waved "okay."

MR. KONRAD: I think you have to get close to the mic.

MR. MATTHEWS: I'll do the best I can.

BY MR. MATTHEWS:

Q Two through six, Mr. Willis, what are those?
A It is a general summary, not an exhaustive summary, but a general summary of my qualifications and experience and training.
Q Turning to Page 9 at the top, it says "Employment/ Professional Experience." Right?
A Correct.
Q It just goes down what you have been doing as far as job-wise. Right?
A Yes, it does.
Q With all your past jobs as well. Right?
A Yes.
Q And then turning to Page 12, does that list out your "Instructor Credentials"? Right?
A Yes. It is not totally exhaustive. A few may be missing, but those that I could recall, it is three pages.
Q It is fair to say you have more instructor credentials than anyone in the State of Wisconsin?
A For my age, I would suspect that. I can't say that as being categorically true, as there is a lot of very well trained people in the State of Wisconsin.
Q Turn to Page 15. At the top, it says "Consultation and Training Experience." Right?
A Yes.

Q That is not an exhaustive list. Right?
A Yes. It says "Representative List."
Q About three-fourths of the way down, it lists the Milwaukee Police Department. Right?
A That's correct, yes.
Q You have been involved in consultation and training with the department. Right?
A Yes, I have done instructor training, particularly defensive and arrest tactics training, I have run several instructor courses. Most of those were before 1996 or 2000, because, at that point, they took that function over. I also did some consulting on in-service trainings for Milwaukee police.
Q What is your --
A I have done -- Also, so I don't forget, I have done a number of instructor updates at the Milwaukee Police Department as well. Those are more recent.
Q What is your trainer status with respect to DAAT, tactical response and firearms?
A My title, if you will, is senior master instructor.
Q Are you the only one in the state to hold that title?
A Yes, I am.
Q Is that higher than a master instructor trainer?
A My ego wants to say yes, of course, but it is an elevated position, yes.

Q Just looking at your CV again on Page 19, it lists your professional presentations in a sample. Right?
A Yes, it is representative. It is not totally exhaustive, but it is fairly accurate.
Q You have been retained as an expert in police procedures in this case. Right?
A Yes, sir, I have.
Q You are being paid by the MPA. Right?
A Yes.
Q Did the MPA pay you to reach a certain opinion in this case?
A Absolutely not. I am simply paid for my time and to conduct an investigation and to basically come up with my findings and opinions and, if asked, to testify.
Q Were you asked to reach any specific opinion one way or another?
A No, I was not.
Q Have you testified as a DAAT expert before?
A Many times, yes.
Q Have you testified both for and against officers?
A It depends on the venue, but the answer is yes, I have.
Q Has your testimony been found to be fair, accurate and reliable?
A To the best of my knowledge, it has, yes.
Q Are the opinions you are about to offer in your testi-

mony today to a reasonable degree of certainty, probability in the field of police procedures?

A I believe they are, yes.

Q What serves as a guide for Wisconsin police officers' use of force?

A Could you repeat that? I missed a couple words.

Q What serves as a guide for Wisconsin police officers' use of force?

A A number of things. The United States Constitution, Wisconsin Constitution, state law, various case law, both federal and state, department policy, department training, and when it comes to use of force, the authoritative manual, Defensive and Arrest Tactics manual, and I can explain why, if you wish.

Q Is that the Defensive and Arrest Tactics manual, is that commonly referred to as the DAAT manual?

A Yes, it is.

Q Is that Exhibit 1 in front of you?

A Yes, it is. This is the 2020 version. It recently was updated. I was part of the group that updated this. I suspect it was the 2018 version that was in force during this particular incident, but there really was no substantive change. There were just some additions this manual made.

MR. MATTHEWS: Can you pull up

Exhibit 8 and Exhibit 4?

MS. MC KENZIE: Eight and four?

MR. MATTHEWS: Yes, ma'am.

A Four is the firearms manual, also dated 2020. I am not aware of any tremendous change to that manual from 2017, '18 or whatever manual preceded it. What was the other exhibit?

Q Exhibit 8.

A What am I looking for?

Q The Tactical Response guide.

A I don't seem to have that here. Yes, I have that.

Q You have all the documents in front of you?

A That one is dated December, 2019, so that is also the most recent one, but one that was not in existence at the time of this particular incident. And again, being on the committee, I know of no real major changes that had been made from this one to the one that preceded it.

Q Were you responsible for drafting each of these documents?

A Pardon me? Was I responsible for what?

Q For drafting each of these documents.

A I was the original author back in the late 1980s of the Defensive and Arrest Tactics manual. It was the first manual for the State of Wisconsin. You can see the tactics, there was a manual. That is why it contains

the use of force elements in it. It was the first, the original. I wrote that. About 1996 -- Actually, it was beyond that. I still remain part of a committee because now, all updates to the manual are done by a committee rather than just by one person, so in the past, it was me. I would update the manual. I would give updates to instructors well into the '90s, perhaps early 2000s, but then, since there were so many good instructors by that time, the state decided there were others that could serve the same function. So from then on, I am on the committee, have always been part of the committee that updates and edits these particular manuals, especially these three.

Q Let me stop you there. That is what's reflected on Page 3 of each of the manuals?

A Yes, it is.

Q Where it lists your name?

A Yes.

Q What is the purpose of each of the documents?

A What is the purpose of me?

Q No, the guides.

A Oh, the purpose of the guides. They are exactly what they say they are; they are guides. They are to develop guidelines and their ultimate purpose is officer safety.

Q So they are written from the standpoint to ensure

officer safety first. Is that what you are saying?
A Primarily, that is the reason they were written. This is training that is given in the police academy to brand-new recruits, but also in-service programs borrow from these manuals to develop their in-service programs and generally, they are coming from the perspective of officer safety, but, of course, you know, safety of the public, safety of civilians, adhering to law. Those are all part and parcel of this manual as well. But the primary purpose is officer safety.
Q So prior to coming here today, did you review the testimony from Monday?
A Yes, I did. Over the past couple of days, I sat down and watched the video, yes. I only watched it one time.
Q With respect to Exhibits 1, 4 and 8, there were a lot of questions about what the text meant. Do you recall that?
A There seemed to be, yes. There seemed to be need for clarification.
Q As the original author, do you have an understanding as to what the text is supposed to mean?
A I believe I do and it is not only because I was the original author, but it is also because I sit in on the committee meetings and I make a habit never to miss one if at all possible. I think I have probably only missed

one in the past ten years, so I keep up with things by attending and contributing in those particular meetings and also, developing updates for instructors.

Q Prior to coming here today, did you look at the incident on video?

A Yes, I did. I looked at the incident -- I mean, I looked at a lot of video, but primarily, the video from Officer Zens' body worn camera was the most important to me and I looked at video recreation as well, video animation that was done in this particular case.

Q With respect to the body worn camera footage, did you look at it at full speed or frame by frame or slow motion?

A I looked at it at full speed many times, I did so going forward, going backward. Then, by using Premier Pro, which is a software program, I was able to slow it down to frame by frame, which is even more than second by second because there is about 30 to 32 frames per second, so I was able to slow it down to frame by frame.

Q Were you able to see Mr. Brown's hands at the moments before or after Officer Zens discharged his weapon?

A When I looked at it, the majority of the time, Officer Zens' hands were up at what we might call the high ready position. He was holding his weapon with both hands and presenting it approximately at his face level. So, of

course, that impeded my view of what was beyond those hands most of the time. I am only talking a couple of seconds here. But several frames before the shooting, his hands dropped down just a little bit, which, as a firearms instructor, I understand and I believe that I was able to see arms. To be honest and truthful -- which I am supposed to be -- I never saw hands together at the center of the body because with the dark subject behind, you know, both Mr. Brown and Mr. Davis, it would be impossible to see those hands. But a moment before the shooting, I believe I see an arm that came out toward the outside, because I can see space underneath it. There is a flash of the shooting, one frame. I also see that space and see what appears to be an arm and then a couple of frames after that, I also see what I believe is an arm. I believe all the arms that I see are the right arm. I believe the left, either I didn't look at it or wasn't looking at it or I just didn't see it. But I believe, in frame by frame, I do see hands up at approximately chest level. I never see any up -- I'm not -- You will have to ask that. I don't want to volunteer.

Q So going into that, do you ever see, based on your review of the video, Mr. Brown's hands going out or in a position where he is giving up or trying to surrender?

A No. That is about what I was going to say. In viewing the video, I never saw Mr. Davis or Mr. Brown, I never saw hands above the shoulder level in a typical surrender posture, the palm-of-the-hand-forward posture. I only saw hands -- again, an arm at the very moment of shooting and a couple of frames afterwards and then it all disappears again.

Q I didn't ask you this. Did you review any other documents prior to coming to testify today relative to this case?

A Yes. There were a number of documents which you gave to me. From memory, I can't probably remember them all, but there were police reports, police investigations, there were interviews that were taken, that sort of thing. I have them in my briefcase here. I could go through them document by document, but basically, all the documents you produced to me, I took time to go over them, yes.

Q Does it comport with your memory that I gave you the Internal Affairs file I received?

A Yes.

Q Is what you saw in the video consistent with what you read in the reports?

A I would say yes, but I understand the nature of reports and I understand the nature of video. They are never

going to be exactly the same. So generally, the same. I see some, what I think are differences only in words chosen on reports that perhaps I would have chosen different words or characterizations had I written that report, but substantially, they do agree with each other.

Q Did you come across anything as part of your review of this case file, the videos and animations, that demonstrated that Officer Zens was -- his perceptions were unreasonable?

A No. I believe his perceptions were reasonable perceptions.

Q Did you review the first charge against Officer Zens?

A That would be the failure to meter charge.

Q Correct. Failure to adhere to policy by not looking and stopping after he lost sight of the suspect.

A Yes, I did.

Q Do you agree with that conclusion?

A No, at least for two or three reasons.

Q Why?

A Number one, looking at Page 17 I believe it is, there is discussion about metering in the emergency response guide. It actually defines metering in one area, not as stopping, but as widely rounding the corner. I believe Officer Zens did do that. Several paragraphs down, it

does talk about stop, look and listen, but I believe that Officer Zens and my review of the testimony of Sergeant Groszczyk -- I probably mispronounced that name -- that officers always meter and it makes it harder the closer you are to a corner. Officers learn that taking a corner widely allows them to look ahead, piece by piece, if you will, even if it is quick, and see what is in front of them. It could be done at very static speeds, slow speeds, or as an active shooter situation or someone you want to get to before they have a chance to barricade themselves or arm themselves, it can be done in a dynamic fashion, which I believe it was done here.

Q I want you to assume that Inspector Formolo testified earlier today, he testified that Officer Zens should have created more distance between himself and the suspect while he was chasing him. Do you agree with that?

A No, I don't.

Q Why not?

A Well, there may be cases where that might be preferable, but, you know, I imagine most criminals would love it if officers would create more distance to let them get away. Creating more distance also gives them oppor-tunity to barricade themselves or go into hostile

locations or seek help from others or run into a crowd or whatever they may decide to do. I can't think of a place in the manual where it even suggests -- I stand corrected if it is, but where it even suggests that a concept in foot pursuit is to allow the guy to get further away from you. That doesn't make common sense and I don't believe it is within the manual.

Q I want you to assume that Officer Zens failed to meter the back yard. Does that lead to any harm?

A No. Again, remember that the purpose for that is to prevent harm to himself. This is an officer safety tactic, it is not a tactic to avoid contact with a subject. Nothing came of it in the sense that he did round that corner very rapidly, as I said, wide enough to meter it at a dynamic rate. And he did not encounter an ambush, he did not encounter a subject at that moment who had a weapon bearing upon him. What he encountered was one, perhaps two individuals in the threshold of a doorway, so that led to him continuing then. He certainly did have to slow down. He continued, and as both sergeants who reviewed this case indicated -- and I agree -- he metered the door properly and again, it was probably not a matter of doing it slowly and methodically, but it was metering the door as he moved laterally toward the door.

Q Let me stop you there. Are you saying that even if he failed to meter the corner of the house in the back, he still regained metering once he hit the doorway?
A Yes, that is correct. He did.
Q So any failure to meter was mitigated by metering the doorway?
A Correct. And again, as I said before, he did meter the corner as well by the definition supplied in the manual of rounding the corner widely. He didn't meter, if you adhere to the strict you must stop, but it doesn't say "stop." It is a guideline, it is a suggestion and that is all it is.
Q When Officer Zens was chasing the suspect, did he have the position of advantage?
A It is a hard one. I mean, the only position of real advantage is when you have someone in custody in handcuffs and they have been searched. He was striving for position of advantage. It is one of the main precepts of the manual that officers should always have position of advantage and it is their perception as to whether they have it or not or can gain it or not, which mitigates their actions or prompts their actions. So it is something he was seeking, so from, I guess, some standpoint, he was attempting to gain the position of advantage. He certainly did not have a full position of

advantage.

Q Would stopping have compromised Officer Zens' safety?

A It certainly could have. Now we are starting to engage in second guessing. Had he stopped, it could have all gone wonderfully or it could have all gone horribly. You can't jump into the future and predict the future.

Q Let me stop you there. What do you mean by "we go into second guessing"? Is that not allowed?

A Second guessing is frowned upon, let's say. I am not a lawyer, but I teach Constitutional law for the State of Wisconsin. I am allowed to teach what the state tells me I can teach, and one of those things is a court case called Graham v. Connor. Even though it is a federal case, it involves violation of Constitutional rights, not criminal acts. In my experience, it has been used in all courts, including proceedings like these, to help critique an officer's actions. One of the -- I am trying to find the correct word -- not rules, but one of the elements of a proper Graham decision is to take the situation from the perspective of the officer and what he or she knew at the very moment they took that action and not to critique it like an armchair quarterback or in 20/20 hindsight because, of course, then you have much more information than the officer had at the moment of the decision, if that answers your question.

Q That's a U.S. Supreme Court decision. Right?
A That is correct. And there are several others that pretty much say the same thing.
Q What would have happened if Officer Zens had stopped at the corner?
MR. PEDERSON: Objection. Calls for speculation.
MR. KONRAD: I think that --
MR. MATTHEWS: I can ask a different question.
MR. KONRAD: No, I think it is an appropriate question. Go ahead.
A Again, I already said I --
MR. KONRAD: The question is what might have happened, I guess.
A Well, I can't read the future, but certainly, from my experience and from training, I can theorize hypothetically as to the possible things that could have happened had he stopped. One thing that could have happened is nothing. All right? Another thing that could have happened is Mr. Brown could have turned around and come back around the corner toward the officer, armed or unarmed. Mr. Brown could have continued running. Mr. Brown could have entered that residence, barricaded himself, taken hostages or Mr. Brown, from his position,

could have acquired other officers that might be responding from different positions, could have acquired them as targets and shot them. Now, there is probably even other things that could have happened. He could have locked the door and necessitated a SWAT call to deal with a barricaded subject. He could have gone in the house and committed suicide. Again, there is just all kinds of things that could have happened.

Q Is there any guarantee that the situation would have unfolded differently?

A No. There is just as much chance it could have unfolded worse.

Q Are the steps in the Tactical Response guide mandatory?

A We do reference some things that are mandatory, but those are usually things that come from law, statutory law or court cases such as Graham v. Connor. When it comes to tactics, tactics are not mandatory. Tactics are advice, counseling, they are guidelines, precipitated by the need for officer safety. They are not mandatory, I guess, unless for the purpose of this hearing, they were precisely quoted and listed as a mandatory ministerial duty, either by law or department policy, I guess. I don't see that.

Q I want to turn your attention to the second charge. Are you familiar with that charge?

A The target isolation charge.
Q Officer Zens was discharged for failing to have target isolation when discharging his weapon. Is that right?
A That is my understanding.
Q Do you agree with that conclusion?
A Absolutely not.
Q Why not?
A Target isolation, as I used to say teaching for Calibre Press all over the country, is something people like to have, it is nice to have, it is safer for everybody if you do have it, but it just doesn't always exist. Target isolation means can you fire your weapon without unreasonably endangering innocent civilians or others? There is an exception to that as generally, there is an exception to just about everything, even target acquisition and identification. The exception is that greater danger rule. That is not really a rule. I just would say the greater danger exception.
Q What is that exception?
A Well, it just generally states -- I will paraphrase -- if it is more dangerous not to shoot, then you may take the shot. The example might be, as is given in the manual -- There are many examples. There is many real life examples that I could talk about, if you wish, and it is always a concern in a school shooting, for

example, where there are going to be people around. If it is safer not to shoot, then you probably shouldn't shoot. But if you are not shooting, if your inaction is going to endanger yourself, your life or the lives and health and safety of others, even though there is risk involved, you may take the shot. It is better to do that and stop that person from possibly killing you or others.

Q Is target isolation the same thing as absolute target isolation?

A No. When it comes to those rules -- again, not rules, guidelines in the manual, there really are no absolutes. Everything has to be taken into context, everything is offered as a guideline, and again, if I read through these manuals right now, I might find some absolutes, but when we are talking about this specific subject matter, especially acquisition, identification and isolation, these are not absolutes.

Q You listened to the testimony of Sergeant Groszczyk. Right?

A Yes, I did.

Q Did you hear the part about hit rates?

A Yes, I did.

Q What is the national average for hit rates?

A The latest studies I am aware of put hit rates around

the nation, it's somewhere between 17 and 25 percent. My training -- of course, when I do training -- and I don't physically do training anymore -- when I did training, I would note that Wisconsin officers often did a better job than that. The hit rates were higher than 17 to 25 percent. What I did notice, even in close quarters, confrontations, officers can miss for a variety of reasons. The national average, 17 to 25 percent. My suspicions are it is probably better than that now, but I don't know of that. I do know Wisconsin does a better job in training, so Wisconsin hit rates are better than that average. Nowhere on earth is there a hundred percent, 90 percent or 80 percent hit rate that I am aware of.

Q It is fair to say that officers who discharge their weapons during critical incidents miss routinely. Right?

A "Routinely" is a subjective word. All I can say is it is not infrequent. I know of cases where an officer shot seven times and hit the subject seven times, a Milwaukee police officer I testified at a coroner's inquest. It was in a bank. Shot seven times, hit the subject seven times. But that is extremely rare.

Q Let me ask this. Did Officer Zens miss because he did anything outside of his training or tactically wrong?

A Not that I can see, no.
Q So why did he miss?
A Well, as a firearms instructor, you are always looking why someone misses the target and you have to understand the dynamics of firearms confrontation. A term that's already been used by Sergeant Groszczyk is "action versus reaction." Once an officer makes a decision to fire his or her weapon, a number of things have to happen. Number one, that decision itself may take upward of a half a second. Meanwhile, the subject is still animated. The finger, which is trained to be outside the trigger guard and on the outside frame of the weapon, has to be moved to the actual trigger itself. Then the officer has to make that decision to pull that trigger and all the processes, be they the nerve impulses sent on the affected motor nerves, they are connected to skeletal and muscular systems, have to be activated. And finally, the trigger has to be pulled. Now, the way I have described it sounds like it takes an hour. The reality is, most things are generally accomplished in about three-quarters of a second or so. Here is the problem. When the officer makes the decision to shoot, he has the weapon pointed in a specific direction at a specific target, but by the time the trigger gets pulled, that target can move. A

Force Science Institute study -- which I am a member of that organization and a graduate of their courses -- shows that the human body can turn 180 degrees away sometimes in less than a tenth of a second, so much faster than an officer can actually fire the weapon once the decision is made. That sounds incredulous, but through high speed photography and peer review of the studies, it became quite clear. Of course, nobody beats a bullet. It is that action to fire the trigger. The decision and the action to fire the trigger which can slightly alter circumstances. There have been people where officers have sworn they shot to shoot someone in the chest. The autopsy findings were the subject was shot in the back. On its surface, that sounds pretty bad. But when you break it down to the fact that that person could turn three, four, five times faster than the officer could make the decision and actually pull the trigger, it becomes more understandable. The same thing here. When the decision is made to fire the weapon, there is a time frame in which people can move and, as we know, Officers Zens was also moving somewhat. So in that time frame, what one aims at and what one hits can change.

Q Can officers discharge a weapon without target isolation?

A In the excepted circumstances, yes. I can think of defense of self, defense of others or in defense of the community at large, but there was another one that was etched out a while back called -- I will probably get this wrong. It's the cleaned-up term for "suppressive fire." It is directed fire. Specific target directed fire. If you want me to explain that, I will.

Q I want to go back to the greater danger exception. Is there any evidence that you uncovered prior to coming here today that showed that the greater danger exception did not apply to Officer Zens' actions?

A No. I believe it does apply to his actions. Nothing tells me to the contrary.

Q So is it your opinion that he didn't have that target isolation because the greater danger exception applies?

A It is my opinion, yes.

Q You were talking about Mr. Brown's hands before. There was a question from one of the commissioners about "show me your hands." I know it is very precedent because we had a conversation about it and the question from the commissioner was, why are officers asking individuals to "show me your hands" and when someone shows their hands, they are shot?

A That's been ingrained in police training since the late 1970s. It was made famous by Calibre Press. I did some

work for them, taught for them for ten years. I also consulted on their major books and videos. And a man who talked with me named Dave Smith came out with some humorous videos, actually. They were designed and he called them "entertrainment." It was designed to impress upon officers certain things. One of them was see the hands. Hands kill. So ever since then, that's been basically part and parcel with most police trainings. Policemen will encounter someone, let's say, at a traffic stop or a domestic or on the street and they see that the hands are in the pockets. It is almost a knee jerk reaction to say "show me your hands. Get your hands out of your pockets." Well, I always had a problem with that, but there was an article that just came out yesterday. Of course, no one here would have seen it. It just says we have to, kind of, rethink that and I agree with that because, for example, if I come up to stop you and then frisk you and your hands are in your pockets and I say "show me your hands," if that hand is in the pocket that contains a gun, somebody can pull it out and shoot you. There have been instances like that, recorded instances of officers just doing exactly that; telling someone to take their hand out of a pocket and they ended up getting shot. So we used to teach them the situation is to stop and frisk. We are

not talking dynamic circumstances now. Where things are slowed down and things are seemingly peaceful at the moment, it might be better to tell someone "don't take your hands out of your pockets. Please turn away from me." Maybe you would even move and tell them to slowly take one hand out of a pocket, take the other hand out of a pocket. That's in a stop-and-frisk setting. In dynamic circumstances, I still have to default to hands kill and we have to see those hands because they access weapons.

Q Just so I am clear, the training that Officer Zens received is his comment to "show me your hands," that is consistent with his training. Right?

A Yes.

Q But the whole concept is being rethought, kind of, like the commissioner was asking. Correct?

A Correct.

Q But that's not something that was available to Officer Zens at the time of the incident, was it?

A No, it would not have been.

Q Did you see, after Officer Zens gave the command to "show me your hands," any actions from Mr. Brown demonstrating that the action was putting his hands up to surrender?

A No, I did not.

Q Again, that is based on your review of the video at full speed, slow motion. Right?
A Right. And again, much of it was precluded from my view because it was dark, it was fast, and in many cases, Officer Zens' arms and the weapon itself were in the way of viewing both people in the threshold of the door. But I saw no hands again go up in a surrender mode. I eventually did see hands moments before -- not hands; arm moments before the muzzle flash and perhaps a frame or two afterwards. But it was not in any surrender style position that I am aware of.
Q I want you to assume that Lieutenant Looney took the position in his report -- which I believe you reviewed -- that Officer Zens' use of force was reasonable and justified. Okay?
A Sure. Many people took that view.
Q Is there any way to separate out target isolation from Officer Zens' use of force?
A I am not sure I understand your question. No, there is no way you can separate it out. It was part of the totality of circumstances he encountered. He had a situation that threatened his life he believed and he took appropriate action and isolated the target as best he could, I believe.
Q So is it credible for the department to say that the use

of force, which was discharging the weapon, is justified, but the target isolation -- the lack of target isolation is a violation of policy?

A It seems to be a contradiction. As I think about it, I guess it is an apples and oranges situation. They are two separate things, but they are so intimately tied together, saying that the shooting was justified --

Q Wasn't target isolation part of the shooting?

A -- would seem to also say that target isolation was an issue that was overridden by the circumstances.

Q So target isolation part of the overall use of force, though?

A Yes. It is part of the use of force decision-making process.

Q Is your ultimate conclusion that Officer Zens' use of deadly force was reasonable and done in self defense?

A Yes, that's my conclusion, as privileged by law and I believe as trained, based on these manuals and department training.

Q And you make that conclusion even though he didn't have target isolation.

A Yes, I do.

Q Is that based on a reasonable degree of certainty and probability in the field of police procedures?

A Others may differ, but I believe it is.

Q Is it fair to say he did what he was trained to do?
A Absolutely.
Q Do you believe he an acted in accordance with the DAAT manual, SOP 460, the Tactical Response guide and his training?
A Yes, I do.
Q Do you agree with the conclusions reached by the chief's expert?
A I do agree with his conclusions.
Q So the only two experts in this case say their opinions that Officer Zens acted within the law, his training and policy?
A Yes.
Q And the only one that differed that you reviewed was Lieutenant Looney. Right?
A Correct.
Q Does he carry the same expertise as yourself?
A My understanding is Lieutenant Looney was, in the past, a firearms instructor. That is the only certification he carried, as far as I am aware. Again, I guess I have more training in the subject matter than he would, especially because of the DAAT training.

MR. MATTHEWS: That is all I have for you.

MR. KONRAD: Mr. Pederson, you may

proceed.

MR. PEDERSON: Thank you.

MR. KONRAD: We will break at noon. Are you aware of that?

MR. PEDERSON: Understood.

CROSS-EXAMINATION BY MR. PEDERSON:

Q Mr. Willis, as it relates to metering, you had indicated that the purpose of a foot pursuit is to apprehend the person you are pursuing. Right?

A Correct.

Q And that metering, in some circumstances in terms of stop, look and listen, could work against that effort. Is that right?

A I don't think that is what I said, no.

Q All right. You did call into question the wisdom --

A I think I said stopping might work against that or allowing greater distance to be created could work against that, but I never said metering itself could be counterproductive to a pursuit.

Q Fair enough. Would you agree with me that foot pursuits are, in themselves, a dynamic situation?

A Absolutely, yes.

Q And that officers need to be constantly in a point of assessment during a foot pursuit whether they want to maintain or that perhaps break off as a tactical matter?

A Well, that is not just in foot pursuits. That is in every police activity, as it states in the manual, that decision to disengage and/or escalate.
Q Sure. So your position is not that an officer in a foot pursuit should never stop, look, listen, but only that they should assess whether that is the best tactical decision in a particular foot pursuit they are involved in.
A I think I agree with your statement. There are times, if they choose to do so, they can use their discretion to stop, look and listen if they want to.
Q And one of the reasons why an officer might want to do that is to avoid the possibility or deal with an ambush. Right?
A That's one factor, I guess, could be weighed in, yes.
Q As you said, officers should constantly, to the extent they are able, tactically be trying to put themselves in a position of advantage. Right?
A Yes.
Q And if, hypothetically, a person they were pursuing who they believed -- Strike that. A person they were pursuing had demonstrated that they may, in fact, be armed and that they may, in fact, be violent, if they go around a corner and lose sight, there is a good reason for the officer to be concerned about an ambush. Right?

A There could be. You have to factor time into it as well.
Q We have been talking about half a second a lot here and you said that a person can move 180 degrees in a tenth of a second. Right?
A Correct.
Q So, again, since we are talking about hypotheticals, isn't it hypothetically possible that the person being pursued here in that half second when he was around the corner and lost sight could have stopped, turned around and had a firearm ready as soon as the officer appeared around that corner?
A That is possible. That is one risk of any foot pursuit. It can happen whether there is a corner or not.
Q So that is just an example of the kind of scenario that officers need to consider and be prepared for as they are performing their jobs in the field. Right?
A Sure. It is a scenario that should be trained. It is a scenario that could occur, yes.
Q As it comes to target isolation, you indicated during your testimony, that it is -- that it relates to whether an officer -- or trying to minimize unreasonably endangering others. Do you remember that testimony?
A Yes, I do.
Q All right. How do you determine what is reasonable and

what is unreasonable?

A That's a conclusion you reserve for the trier of fact. When I look at it as a trainer, what is reasonable versus what is unreasonable has a number of elements. Common sense being one of them, officer perception being another one of them, totality of circumstances being another one of them. There's a number of ways it is determined whether somebody is reasonable or not; comparing it to similar incidents, an officer's past experience may also factor in. Again, whether something is reasonable or not is usually something that is judged in the aftermath. Whether something is feasible, possible, safe, unsafe, worth trying, not worth trying, those are the types of decisions officers are making to -- to color the officer's response. They are not, as you are aware, making conscious, logical decisions when they are in a crisis situation. They are deferring to their training and their experience and the experience of other officers.

Q It sounds to me that one of the distinctions between unreasonable and unreasonable in a particular situation just calls on a judgment call of the thorough review of the facts and the circumstances. Is that right?

A You said "unreasonable" twice. I think you meant to say "reasonable or unreasonable."

MR. PEDERSON: That is what I meant to say if I did not say it.

A Correct.

THE WITNESS: Could you read the end of the question for me? It was something about a judgment.

(Question read)

A Not necessarily, because it can only be the facts and circumstances known to the officer at the time the action was taken.

Q But after the fact, someone has to look at it to make a determination whether it is reasonable or unreasonable based on the facts that were --

A Absolutely, yes.

Q And you have done exactly that. Right?

A I tried.

Q You also said that when you offered your ultimate opinion in response to Mr. Matthews' questions where you said that you thought it was reasonable, but others may differ. Do you remember saying that?

A Sure.

Q So that is a recognition that, on some points, that reasonable minds can reach different conclusions. Isn't that right?

A Everybody has the right to be incorrect.

Q Is it your opinion -- Strike that. Do you ever make incorrect decisions?
A Sure.
Q You are not here to claim, obviously, that you are infallible in your decision making. Right?
A No, I am not.
Q In fact, you have never been a chief of police, have you?
A No. Rank was something I never sought.
Q And you have never had to make the kind of discipline decision that is involved by the chief of police here, have you?
A Well, I have been part and parcel with the making of those decisions.
Q Absolutely. I expect many times throughout your career, chiefs and other leaders of institutions who were decision makers sought out your opinion to help them make a decision. Right?
A That is correct.
Q Absolutely. But in every single instance, the ultimate decision was that decision maker's; not yours. Right?
A Yes.
Q In that situation, we would expect them to give you due weight and consideration of your opinions, but you don't make that decision. Right?

A A bunch of questions there. I would expect them to give them due weight. Sometimes they don't, but that is their decision.

Q You had indicated that you believe Officer Zens was justified in not having target isolation because of the greater danger exception. Right?

A Yes.

Q Is it your position that whenever a police officer themselves perceive themselves to be in danger, that the greater danger exception always applies?

A Not necessarily. Several of the manuals, especially the PowerPoint -- even though they are not in evidence -- and the instructor development manual gives some illustrations. For example, it gives one illustration where you have an assumed armed subject, a group of innocent people and an officer behind and the idea is that the subject has this gun to either shoot at the officer or at the innocent people, but there is a crowd of people in between the officer and the subject; in between. The manual suggests that's probably not -- even if you had an exception there, you probably wouldn't take the shot because it would unreasonably endanger people. The next slide has something a little different. It has an armed subject, a police officer and then four or five people -- these are just stick

figures, diagrams -- standing behind the officer and that slide opens up the door for the officer taking the shot if he reasonably believes, to the best of his ability, he can make that shot, it's ethical, legal, it is according to training, that he may take that shot. He still could sacrifice his life if he wanted to, but he could also take the shot.

Q Let me present you with another hypothetical. Let's have a bad actor who has shot at an officer and has -- and an officer has every reason to believe that bad actor will shoot at him again, but that bad actor is in a crowd; in front, around, no target isolation. Okay? Do you follow me so far?

A Pretty similar to the first illustration I gave you, yes.

Q I understand. So we have a similar situation where we have target acquisition and target identification, but no target isolation. Would you agree with those?

A Yes.

Q In that circumstance --

A Well, not to -- I would say there was partial target isolation. Again, from what you can see in the video, I am surprised -- I know the officer has stated he knew there were two people in that doorway. Fine. But at the moment he took that shot, the second person behind

the first person, to me, it almost appeared as if it was only one person. We know it wasn't. He knew it wasn't. But he had the majority of that person well within his capacity to take that shot. Bullets can always over-penetrate and go through people and hit secondary targets. In this case, that is not what happened. People move, the officer was moving, circumstances ended up that the subject behind was peripherally hit. So he had partial isolation, but he certainly didn't have full target isolation.

Q I appreciate that clarification, Mr. Willis, but the point I want to get to -- or what I am trying to get to is, is there a scenario -- yes or no -- where an officer has acquisition and identification, but not complete isolation, that officer believes they are in mortal danger for themselves, yet the greater danger exception would not apply because it is unreasonable to fire because no matter the degree of threat to themselves, they pose too great a risk to others?

A Yes, and I know officers that have done that. If there were too many people, you can't shoot innocent ones to get at the guilty one -- or the suspected guilty one.

Q I think that is an important point because if that wasn't the case, then the exception would swallow the rule, wouldn't it?

A You know what you mean by that. I don't know what you mean by that.
Q I can try to clarify it for you. Why does target isolation as a principle exist?
A To allow officers to take action in situations where it would be more dangerous to them, others or the community not to shoot.
Q I think you misunderstood my question. I asked, why does target isolation exist, not greater danger. Why does target isolation as a principle exist?
A To minimize the risk that innocent parties would be shot. I said "minimize," not preclude. Minimize.
Q The greater danger exception exists because sometimes, the threat of not -- the potential harm of not shooting is greater than shooting. Right?
A Correct, and numerous tragic incidents have taught us that.
Q So your conclusion here is that Zens did not pose an unreasonable threat to the person who was shot, Mr. Davis, when he fired his weapon.
A Taking everything into consideration, no, he did not pose an unreasonable threat.
Q When Mr. Zens chose to fire, he knew that harm to an innocent bystander was a potential outcome, didn't he?
A It took longer for you to ask that question than the

time he had to make that decision. He knew there was another person there. He knew he believed he was in mortal danger. He knew he believed he could take that shot. He knew that he could take that shot and did take that shot. He admitted -- And again, it is surprised me initially. He admitted he knew there were two people there, but again, he is a former firearms instructor, military firearms instructor. He believed he could take that shot to minimize the danger to the civilians.

Q Well, you'd agree with me in that moment -- and I don't dispute that it was anything more than a moment -- but in that moment, he had to decide that the potential threat to him was lower than the certainty of the threat he would pose to Mr. Davis if he pulled that trigger.

A I would say just the opposite. The only thing he knew at that moment was the potential threat to him was lethal and that there was less threat to Mr. Davis. Again, I don't even know if he had the opportunity to factor that into his decision. What he knew at the moment of impact was shoot or die.

Q But a reasonable officer in his position, even though it was quick, would know that the potential outcome that happened here did in fact -- was a possibility. Right?

A I think that may be something that officers think about

on their own, maybe posed during training, but at that moment, it is hard to hold two thoughts in your mind at the same time and one of those is I might die, so I don't think at that moment, he believed he could make the shot, he believed he was going to die if he didn't make the shot. I am not so certain that he factored in a potential danger to Mr. Davis. You'd to have ask him that.

Q Isn't it fair to say after this review, that the determination of what is reasonable and unreasonable and weighing the -- the exception versus the rule is -- can be a complex consideration? Right?

A Well, it can be for some. For me, it wasn't. I thought this was quite a simple consideration on my part. It was according to training, it was according to the manuals, it was according to policy, it was according to what I and other firearms and defensive and arrest tactics teach. To me, it was actually a fairly simple determination. To others, they can speak to whether it was complex or not. It is multi-faceted.

Q So is it your opinion, then, that anyone that disagrees with you is unreasonable?

A No. I didn't say that.

Q That is the question, sir.

A No. They are simply perhaps coming from a different

perspective with different experience and with different responsibilities.

Q Can you tell me with certainty that you believe that the chief's decision here was wrong?

A Yes, I believe the chief's decision was wrong.

MR. PEDERSON: Very good. That is all I have.

MR. KONRAD: Thank you, Mr. Pederson.

Mr. Matthews?

MR. MATTHEWS: Yes, quickly.

REDIRECT EXAMINATION BY MR. MATTHEWS:

Q You were asked some questions about the ambush situation, potential for ambush --

MR. KONRAD: Before you start, it is lunch time, so I am trying to decide whether we can finish with this witness or whether we should continue at 12:45.

THE WITNESS: I can help with that. They can finish.

MR. MATTHEWS: I am going to be really quick. That is literally the only question I have.

MR. KONRAD: I'm not trying to rush you. It is important testimony. I am not trying

to rush you. Go ahead.

BY MR. MATTHEWS:

Q There were some questions asked about the ambush and that the individual could turn all the way around in a tenth of a second and didn't that leave the potential open for Officer Zens being shot at. Right?

A Yes, I remember that.

Q Would it have been possible for Mr. Brown to stop running, turn around, pull out a weapon and fire at Officer Zens in that half a second?

A In half a second?

Q Yes.

A No, I don't think that would have been possible.

Q That is how long Officer Zens testified he lost sight of him?

A That is what Officer Zens said and testified to, yes.

Q So back to the ambush question. Would it have been possible for Officer Zens to be ambushed when he came around the corner by Mr. Brown?

A Anything is possible, but I think it is highly unlikely he would have been.

MR. MATTHEWS: That is all I have.

MR. PEDERSON: No follow-up.

MR. KONRAD: No questions?

MR. PEDERSON: None.

MR. KONRAD: We have -- Commissioners have a chance to ask questions here and two of them are up there. Are there any questions from the commissioners?

MS. MC KENZIE: I don't have any.

MR. CROUTHER: I have one. Mr. Willis, did that officer used perception and reason? I -- I don't see perception in the shooting, but I don't know if it was reasonable -- more reasonable. Am I right?

THE WITNESS: To be honest, I did not understand.

Could you read that question back?

COURT REPORTER: I did not understand the question, either.

MR. KONRAD: I think we went a little in and out, so if you could repeat the question.

MR. COCROFT: He wants you to repeat the question.

MR. CROUTHER: My question is, you used two generalities about perception and reasoning and it seems, from my point of view, there was more reasoning than perception in this incident.

THE WITNESS: I am going to assume -- I still didn't quite hear everything, but, I

think I am following you. In the DAAT manual, one of the special circumstances in use of force is a reasonable perception of threat. So those terms can co-reside with each other. Was the perception of threat a reasonable perception? It just depends on circumstances. There have been incidents where the person is holding a cell phone, but crouching and pointing it like they were pointing a gun have been shot. It turns out it was a cell phone, it wasn't a gun. But was it a reasonable perception of threat based upon posture, body language and previous behavior? The decisions that I am aware of have said yes, it was a reasonable perception of threat. I don't know if that answers your question or not. I am not certain I totally understood your question, but that is the best I can do.

MR. CROUTHER: I will leave it there. Thank you.

MR. KONRAD: Mr. Cocroft?

MR. COCROFT: Yes. Mr. Willis, when you were reviewing the body cam footage, you said you saw one hand go up and -- the arm, and air in between. You say you saw the other arm go up. Couldn't one argue that was a motion to raise his hands in a surrender? Could that be an argument, or were they like this, coming at him?

THE WITNESS: I never --

MR. COCROFT: I saw the video. I wasn't able to --

THE WITNESS: Like I said, I saw it frame by frame, but let me be clear. I never saw hands together. I never saw hands coming forward. I never saw hands going up. What I did see was a hand come from this level and slightly outward literally at the moment of the shot and just a moment thereafter. So I know the arms were not down, I know the arms were not up, and I know the arms were not out. I know the arms were in and then at the moment of the shooting, the arms began to come out. That is all I know.

MR. KONRAD: For the record, I think the witness demonstrated the right arm going out slightly to the right at the shoulder level.

Is that about accurate?

THE WITNESS: Right. I didn't see a hand. I saw what I believe to be an arm and the space underneath it.

MR. COCROFT: Okay. Thank you.

MR. KONRAD: All right. Do any of the lawyers have any questions as a consequence of the commissioners' questions?

MR. PEDERSON: Not the chief.

MR. MATTHEWS: No.

MR. KONRAD: Okay. Thank you for your testimony.

(Witness excused)

MR. KONRAD: We will adjourn until 12:45 and are there any more witnesses?

MR. MATTHEWS: No. We rest.

MR. PEDERSON: None.

MR. KONRAD: Then we will have closing arguments at that point and then we will go into executive session for deliberation on Phase 1.

MR. MATTHEWS: I am fine with waiving closing. I have already made my piece, I feel.

MR. KONRAD: I am sure Mr. Pederson has a closing.

MR. PEDERSON: I do.

MR. KONRAD: You can't really combine the two because we need Ms. Triggs to set up our closed session.

(Lunch break was taken)

(A document was marked as Exhibit 21)

MR. KONRAD: Good afternoon. It is now 1:00. We will continue with the hearing. At this point, both parties have rested and I assume that all the exhibits marked have been moved into evidence. So

it is now --

MR. MATTHEWS: Just a point of clarification on Exhibit 21. I would object to that exhibit as, first off, it is a redacted copy of the SOP which goes back to the issue of it not being produced to Officers Zens originally or at any point. The only version available to Officer Zens is this redacted copy and it was never provided previously in any form.

MR. KONRAD: I note your objection. My only purpose in asking for it was I'd like to, since the last case, we had an issue where the complainant didn't cite the SOP correctly, it was a different subsection, and the Complaint was later amended to correct that. So I wanted to make sure that what's is cited in the Complaint is exactly the same as what is cited in the SOP. So that was my sole purpose in asking for it.

MR. MATTHEWS: If we can note on that as well the charge number, what I have been calling Charge 2, which is Exhibit 14, under the Specification, it notes that it is referencing the Wisconsin Law Enforcement Standards Board Tactical Response Training guide and it is not quoted language from the training guide. It is actually referring to language that's found in the DAAT manual and the firearms manual.

MR. KONRAD: Where is that?

MR. MATTHEWS: Exhibit 14, second-to-the-last page at the top.

MR. KONRAD: Let me find it. Okay. I have it.

MR. MATTHEWS: Second-to-the-last page was the Specification.

MR. KONRAD: I have a note here. It should be the firearms.

MR. MATTHEWS: It is the firearms and it is also in the DAAT manual.

MR. KONRAD: Thank you. With that, your objection to the exhibit is overruled.

Both sides now have an opportunity to present closing statements. Mr. Pederson, would you like to give a closing statement?

MR. PEDERSON: I would. Thank you. I'd just like to start out by saying that I acknowledge from the get-go that this is not a clearcut case, that this is a close case and, you know, I have many times used the phrase "reasonable minds may differ" during the course of this appeal hearing and I will, with your indulgence, continue to use that phrase because I think it is appropriate. This is an instance where I do believe that someone diligently and reasonably examining

all of the evidence here, could come to different conclusions based upon whether or not there was a violation, which, obviously, is the question that is before us today. The chief, obviously, had taken the position that there was the two violations set forward and I believe that there is sufficient evidence for that and I, obviously, will be arguing for you to find that.

To that end as it relates to the metering aspect, there are a few things I would like to point out first and underscore is the fact that the officer himself has indicated in his PI-21 and I believe on the stand here, that he did not meter, that in his PI-21, he indicated that he was pumped full of adrenalin and fear, which is understandable. Nothing I say here is to second guess the officer. You know, the people who investigated this did not really do that in terms of what is happening here, so far be it from me to do so. I understand it is a rapid and dynamic situation here, but on some level, there needs to be an accounting and so the officer here indicated that -- even himself -- that he probably should have metered. But he was driven by his fear and his -- his concerns and he did not. The questions that we have to ask ourselves then is was that -- even if we accept that he didn't, was that a reasonable consequence? Is that a reasonable event to

occur as this was happening dynamically in real time? The chief takes the position that no, the reason being that there was plenty of information available to Officer Zens at the time to be concerned that the person might be armed. Officer Zens himself emphasized that repeatedly, that he was running with his hands in front of him and in a position which could be securing or accessing a firearm tucked into his waistband in front of him. That being the case, and with the fact that, again, Officer Zens himself indicates, he was aware there was, I believe, a 19-minute chase, a crash involving the vehicle that he himself personally observed. He had every reason to believe this was a person who was desperately running from the police, could have been armed and could have been sufficiently motivated to use a firearm to effect his escape. So when he was pursuing that person, he elected not to meter. In his own words, "I wanted to get the guy." I am paraphrasing there, but in his PI-21, he said something to that extent. That is in sharp contrast to the SOP itself that warns officers not to get into that mindset. It says, "do not let yourself been sucked into the mindset of I'm going to catch this guy at any cost."

MR. KONRAD: You mean the training material.

MR. PEDERSON: Yes, the training guide. It specifically says that an officer should not take that mindset. So, I believe, from his own statements and the facts that we have here, there is a reasonable question on whether or not the officer should have metered and how he should have gone about performing that pursuit, whether he should have held back.

Again, I am not saying there is a black-and-white here and that -- and trying to implicate Officer Zens as a bad officer who just makes bad decisions. Absolutely not. I am just indicating that there is enough here that, upon a close examination, we can determine that there was a violation.

Previously, Mr. Matthews had indicated in questioning a witness, that he thought that perhaps I, through my questioning, had admitted that Officer Zens was being treated differently in this regard, that he was being singled out for scrutiny as related to metering. There is a couple of points I would like to say in response to that.

The first is that the witnesses that were testifying to that were sergeants and other individuals that were in positions to review the video and they indicated that they saw instances where officers did not

meter similar to that of Zens and they were not disciplined. Well, if we think that through, we have to understand that those were not forwarded to the chief. So I think -- I question the argument or the value of that point when we say other department members have not been disciplined for similarly not metering when we have no evidence that the chief was even aware that those had occurred because people below him were not forwarding it on for investigation. But also, and perhaps probably more importantly, my point in my questions that prompted that line of questioning from Mr. Matthews was to illustrate that there is a connection between the metering and the failure to target. Right? The failure to receive target isolation, that it is easy to start dissecting these things and start perceiving inconsistencies when we try to isolate things out from the bigger picture. So it was my point then, and it is my point now, as I am indicating to you that they are separate charges, but they are part of one situation, one totality of circumstances, and under that perspective of viewing the entire picture, the separate charges become appropriate and the scrutiny on like things on metering become appropriate as a part of the totality.

So specifically, my response to the suggestion

that he has been targeted, that he has been inconsistently exposed to discipline due to the metering issue is not correct because there is no other officer that has been presented who was in a similar set of circumstances that contained that issue, the metering that led to a shooting and a failure to isolate the target, et cetera. If we can find that officer, then maybe we can say that. There has been inconsistencies, but that doesn't exist to my knowledge, so that is my response to the idea that Officer Zens has been improperly targeted and scrutinized regarding the metering issue.

Going on to the target isolation issue, again, this is a complex issue, it's thorny. There are ways -- there are alternate ways that this could have been charged and analyzed, but, in the end, we have to pick one method and the method that we have here is the target isolation issue. That can be difficult to tease out regarding the question of was it appropriate to shoot or not, you know, because there was testimony regarding the exoneration on the decision to shoot. Right? So if the decision to shoot was okay, how can we question the isolation and on its face, it can appear contradictory, but I think that is just failing to appreciate the complexity and the intricacies of the rules. They are very much intertwined with one other.

In my questioning of Mr. Willis, I had asked him how is it that the -- or rather, was it important that the exception not to swallow the rule and he indicated that he didn't understand what I was attempting to say there, but I hope you do understand what I mean by that phrase. I don't think it is my own. It is a phrase that is common, to my knowledge, but the idea here is that we can't be in a situation where we require target isolation. That is the rule, but then there is an exception to the rule that we almost -- it is almost impossible to actually apply that rule. Right? There has to be situations where the greater danger exception does not apply, does not excuse an officer from failing to acquire isolating their target. The chief, obviously, is of the position that this is one of those cases.

Again, this is a difficult analysis for anyone to conduct. I don't envy you that. I am just a lawyer here. I have the advantage to you of just being able to make arguments. You actually have to make the tough decision. I want to assist you in making that decision and I think the best I can offer you in that regard is that my posing of the questions to both Sergeant Groszczyk and Mr. Willis regarding whether or not it was reasonable for Officer Zens to conclude that

the threat that he posed to shooting the -- or injuring or hitting the innocent bystander was greater or lesser than the threat that was posed to him by the person he was pursuing. That isn't contained in any of the training materials, to my knowledge, but I asked Sergeant Groszczyk if that was an appropriate way to analyze it. He agreed that it was. I asked essentially the same question of Mr. Willis and he accepted that framing of the issue and offered the opinion that it was reasonable for Officer Zens to perceive that the threat to him was greater than the threat posed to the innocent bystander. So again, I propose that as a way to analyze this case and to analyze that specific charge and once again, I think we are left at a point where reasonable minds can differ.

I believe as a matter of law, there is sufficient evidence for you to find that there was a violation based upon the failure to isolate the target because the greater danger exception did not apply here because a reasonable officer in Officer Zens' position could not have concluded that the greater danger exception applied because his threat to the bystander in failing to get that target isolation was an absolute certainty because he was going to pull the trigger. He knew that. Right? That threat I respectfully submit

for your consideration was unreasonable given the fact that he was only reacting to a potential threat, a threat which was occurring and under circumstances that did not give the officer target isolation because of what -- potentially because of what preceded before it, the failure to meter.

So under the totality of the circumstances, I submit that there is sufficient evidence to find the violation and on behalf of the chief, I respectfully request that you sustain the charge -- both of the charges. Thank you.

MR. KONRAD: Mr. Pederson, I think you did a terrific job and I am just trying to understand the chief's position. I understand that there can be evidence to support a charge. I understand that. But when the evidence is, as you say, that reasonable minds can differ, reasonable minds can differ, this isn't somebody saying I am right and you are wrong. You are saying reasonable minds can differ. How do you square that with the standard we have to apply which is a substantial evidence standard that shows that the preponderance of the evidence shows it was a violation? Differing reasonable minds, how does that establish -- how does that constitute substantive evidence and how does it establish a preponderance of the evidence?

MR. PEDERSON: Well, I think we all understand that if it is a 50/50 call, the defendant wins. Right? That is the way the law works, especially as it relates to a preponderance.

MR. KONRAD: The burden is on the chief.

MR. PEDERSON: Right. The chief has the burden, absolutely, and if, in the end, the commissioners here all decide that it is a 50/50 call, then undoubtedly, the law directs you that you must find that there is no violation.

What I am suggesting is that the evidence here is not 50/50, that it is in excess of 50/50, that based on the admissions and the totality of the circumstances, that it is close to a substantial -- having substantial evidence proving the charges by a preponderance standard. But that is just my opinion. Of course, we can't assign specific numbers, 70 percent, 72 percent. We can't do that, but it is my position that in that regard, not on the 50/50 question, but on the regard of whether there is substantial evidence, there is a close call.

And furthermore, we are talking about an interpretation and an analysis of a discretionary decision. That is, the greater danger exception. That,

in itself, requires an analysis of you asking yourself, given the position the officer was in at that time, should he have made that call? You know, that is always fraught with danger, the second guessing issue, the -- the failing to appreciate that the officer was in a dynamic and rapidly unfolding situation where he had to make a decision instantly and didn't have the luxury to sit back and have arguments and conversations like we are now. Of course, we need to think about it in the situation that he was in.

I am presenting to you that on that point, on those points, there is sufficient evidence for it to go either way. I think that is where I think it is a close call.

MR. KONRAD: All right. Thank you.

Have you changed your mind, Mr. Matthews?

MR. MATTHEWS: Yes. I am going to respond. I will try and be as brief as possible. Obviously, I thank the commissioners. I know this is difficult. It's been a long two days, but thank you for your time. It's always appreciated and valuable. I know it is going to be a difficult decision moving forward and I hope you guys make the right decision.

Attorney Pederson mentioned that this is a

close case. It is not a close case. This is not a close case at all. This is a -- the ripest case I have ever had for a Phase 1 dismissal.

Attorney Pederson also said it is not black and white here, but we want to hold Officer Zens to a black-and-white standard. He also -- Attorney Pederson also wants to have you consider the totality of the circumstances argument, but not with regard to the use of force. That is not a totality of the circumstances. So totality of the circumstances, when it comes to metering, we have to make sure we consider everything else when it comes of metering, but when it comes to the use of force, which the lieutenant has already testified was completely reasonable and justified, we need to look at just one piece of it, which makes absolutely no sense. Look at the conflicting opinions here.

Then you look at the charging language in Charge 1, the metering charge. It specifically says, "Officer Zens failed to adhere to policy when he failed to stop and look for the suspect after losing sight of him." First of all, the policy doesn't say that you have to stop and look for the suspect after losing sight of him. It just says this is a general guideline. We are bound by 62.50(17)(b)(5). It says you have to look at what the actual charges say as described in the

charges and then see if there is substantial evidence of a violation. So the charges here say that he failed to adhere to policy when he failed to stop and look for the suspect after losing sight of him. So that is what the chief is bound by. That is his choice.

Attorney Pederson mentioned there are alternate ways they could have charged this, but we have to focus on what was actually charged and they are -- the chief is held to what was actually charged. He is charged with failure to adhere to policy when he failed to stop and look for the suspect after losing sight of him.

Number one, that is not the policy. Number two, that is a general guide line. Number three. Even if you don't meter -- which again, Officer Zens admitted he didn't meter -- that is not a violation of the policy. Let me say it again. Even if you don't meter, that is not a violation of the policy. Even if you don't meter, that is not a violation of complying with general guidelines, either. That charge needs to be dismissed.

You heard testimony from absolutely everyone other than Inspector Formolo indicating there was no issue with the metering. The two experts, the sergeants, the acting captain, the lieutenant. Sergeant

Groszczyk, I think it's the most telling about Sergeant Groszczyk's report that he didn't even consider the metering because it wasn't an issue. He is the expert here. Not even an issue.

All right. Then you turn to Charge No. 2. Right? That language again, "failed to adhere to policy when he failed to meet the deadly force requirement of target isolation." We have already demonstrated that the policy doesn't require target isolation, so on its face, that charge is wrong. That is just on its face. So if you look at Sub 3 which says, you know, make a reasonable effort, there is no reasonable effort there, because that is not even the real charge. That's not even what the policy says. You look at Sub 2, whether the rule is reasonable. Well, how can a rule that is made up be reasonable? It can't be. That is literally is made up. So we are holding Officer Zens to a made-up standard in both charges.

You can't fail to adhere to policy because the policy doesn't require target isolation. We have gone into that. It is as written in the charges. If the charges said doesn't adhere to policy because he didn't have target isolation and the greater danger exception doesn't apply, that makes more sense, but that is not what the policy says. I mean, that is not the

charges say. The charges don't mention the greater danger exception and they don't mention them, it is my belief, because the chief knew that they do apply and they covered the situation, and that is exactly what the experts testified to.

Now, there's been a lot of discussion about the chief can do whatever he wants, and do you know what? I agree with that. The chief can make any call he wants. The chief can say, "I don't care what all the experts say, I'm still going to fire this person." That's absolutely fine. That is within his purview, and that is what happened here. But the key there is just because the chief decides to do that, it doesn't make it reasonable. The chief can make any call he wants, but that doesn't make it reasonable and more importantly, it doesn't mean it satisfies 62.50 and the just cause factors.

If you remember, Attorney Pederson asked Sergeant Groszczyk the question whether he thought the chief's opinion was reasonable or unreasonable. Sergeant Groszczyk said, you know, to his own potential employment detriment, "I think it is unreasonable based off of circumstances I saw in here and the evidence I have seen." His opinion was sought out by the chief for that very reason. So we have evidence there of the

chief's own expert saying the chief's decision in this case is unreasonable. His opinion on Officer Zens' actions is unreasonable. Why does that matter?

Something Attorney Pederson said in response to Hearing Examiner Konrad's question. He said, "I think we are close to substantial evidence here." Okay. First of all, I one thousand percent disagree with that. But the fact that Attorney Pederson, when asked about the evidence, can't even say there is substantial evidence here, which is Just Cause Factor No. 5. He said, "there is close to substantial evidence here." Well, "close to" doesn't count in these hearings. Even if I agree with that, that it was close to substantial evidence, that -- that is not what the record dictates. The record shows there is literally no evidence that Officer Zens violated the made-up policy. Again, we have the chief, the lieutenant, their use of force expert saying the actual use of force was reasonable and justified. Well, a piece of that use of force is target isolation because the only use of force is discharging your weapon, so you can't say that it was okay to discharge your weapon which included shooting it and hitting someone, not the intended target. You can't say that, but also say, "guess what? Target isolation was necessary here and he didn't have it, so the use of

force was not justified with that little piece." That is crazy. Literally crazy.

all right. Looking at Just Cause No. 5. "Again, whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate." Look at both charges. They are both made-up standards. That's number one.

Then look at the evidence. We do not have substantial evidence here of a violation. Everyone who testified said that Officer Zens' beliefs and perceptions were reasonable. Yes, he turned out to be wrong, but officers are trained not to take that chance. Just because he was wrong and he didn't get shot because Mr. Brown didn't have a gun doesn't make his actions wrong. There is not substantial evidence that anything he did was wrong. There is not substantial evidence that he violated any policy and there is not substantial evidence that he violated what is mentioned in the charges.

So this case needs to be dismissed on Phase 1, both charges. Thank you very much. I appreciate your time.

MR. PEDERSON: Mr. Konrad, I normally don't get asked if I would like rebuttal, but

I would request an extremely brief opportunity.

MR. KONRAD: Well, if I allow it to you, I would also have to allow Mr. Matthews sur-rebuttal.

MR. PEDERSON: I think that is fine.

MR. KONRAD: So go ahead.

MR. PEDERSON: I just want to address the point that Mr. Matthews indicates where I indicated in my arguments that we are close to substantial evidence, but we do not. I suppose I can understand his analysis of my comments in that regard, but I just want to clarify the record. My point in those comments were to say that it was a close call overall. My position and my argument is there is substantial evidence and that you could find that there is substantial evidence. My use of the term "close" is to recognize that it is a close call and that I understand that a reasonable commissioner may decide otherwise. That was my point.

MR. KONRAD: I understood your argument.

Mr. Matthews, anything further?

MR. MATTHEWS: No. That was a direct quote, "close to substantial evidence."

MR. PEDERSON: Sure. I acknowledge

that perhaps I said that, but I am following up to clarify what my point was.

MR. KONRAD: Sure. Thank you, gentlemen. We will now proceed into closed session to deliberate and determine whether the first five just cause standards have been met in accordance with the laws stated in our notice of this meeting.

So is there a motion to move into closed session?

MS. MC KENZIE: So move.

MR. KONRAD: Is there a second?

MR. COCROFT: Second.

MR. KONRAD: Thank you, Mr. Cocroft.

Could we have a roll call, please?

MS. TRIGGS: Commissioner McKenzie?

MS. MC KENZIE: Aye.

MS. TRIGGS: Commissioner Cocroft?

MR. COCROFT: Aye.

MS. TRIGGS: Commissioner Crouther?

MR. CROUTHER: Aye.

MS. TRIGGS: Commissioner Crouther?

MR. CROUTHER: Aye.

MR. KONRAD: Thank you. We are in closed session.

(Closed session 1:35 - 2:30)

MR. KONRAD: Thank you. We are back in session at approximately 2:30. After deliberation, members of the Commission have found as follows:

As to Count 1, unanimously, by a preponderance of the evidence, that Nikolas Zens violated the Milwaukee Police Department's Code of Conduct as charged pursuant to Personnel Order 2020-76. We also find, by a preponderance of the evidence, that the first five just cause factors are satisfied.

As to Count 2, the Commission has found unanimously, by a preponderance of the evidence, that Nikolas Zens violated the Milwaukee Police Department's Code of Conduct as charged pursuant to Personnel Order 2020-76.

We also find, by a preponderance of the evidence, that the first five just cause standards are satisfied.

As for the motion to dismiss, the motion is denied. We will now move to Phase 2.

MR. PEDERSON: The chief would call Inspector Formolo.

MR. KONRAD: You are still under oath, Inspector.

MR. FORMOLO: Yes, sir.

(A document was marked as Exhibit 22)

DIRECT EXAMINATION BY MR. PEDERSON:

Q Inspector Formolo, you should have a number of documents in front of you marked for identification. We will go through them at the appropriate time. But for now, you have already testified that you were present at the meeting. Right?

A Yes, sir.

Q So we will continue with Phase 2, the determination of discipline phase. Do you understand that?

A Yes.

Q Okay. Very good. Is it correct to say that there are a number of standard things that are reviewed as part of this sort of discipline decision?

A Yes.

(Documents were marked as Exhibits 23, 24)

Q All right. Is one of those things, and I direct your attention to Exhibit No. 24. Is one of those things a department member's case file history and prior discipline?

A Yes.

Q Please look at the first two pages of Exhibit 24. Can

you tell me what that is?

A The first two pages is the case file history of Police Officer Nikolas Zens.

Q And the third and fourth page, can you tell me what that is?

A It is the Milwaukee Police Department information record for Officer Nikolas Zens.

Q Looking at this document here marked as 24, can you indicate whether or not the department member's prior discipline history was a factor at all in the determination of appropriate discipline?

A It was not a substantial factor in our decision in that the -- on this document here, it has sustained defenses, but they were not really relative to the incident we were meeting up to put discipline on.

Q Is it fair to say that based on this history, it does not have a history of suspension. Is that right?

A That is correct.

Q Okay. Is the department member's prior performance and job performance something that is considered?

A It is.

Q I direct your attention to Exhibit No. 23. Are you able to tell me what that document is?

A This was a "Milwaukee Police Department Evaluation Report (sic) Regarding Internal Matters."

Q That is the first page you are referring to. Right?
A That is the first page.
Q And the remaining four pages, can you indicate what this is?
A This is the annual "Performance Evaluation for the Rank of Police Officer," the Milwaukee Police Department code as well.
Q Is it accurate to say that in terms of his evaluations, there were no significant problems with Officer Zens' job performance?
A No. There was no significant problem.
Q Was his job performance a significant factor -- or factor at all, really, in determining appropriate discipline?
A I am sorry?
Q Was his job performance in terms of his evaluations a factor in the determination of appropriate discipline?
A No. In terms of these evaluations, no.
Q Very good. Can you please refer to Exhibit No. 22?
A Sure.
Q Are you able to tell us what that document is?
A This is the Response to Charges that was submitted to, at the time, Chief of Police Alfonso Morales from Police Officer Nikolas Zens.
Q Okay. Does this appear to be a true and correct copy of

the Response to Charges that you reviewed at the time of your review with the chief?

A Yes.

Q I see there is a third page here. Are you able to identify that page?

A This is appears to be a typewritten letter from a staff sergeant in the military.

Q Would it be accurate to say that this appears to be in support and is attached to the Response to Charges?

A Yes.

MR. KONRAD: I don't have one attached.

Do you have one attached?

MS. MC KENZIE: No.

MR. PEDERSON: I'd be happy to trade with you. I don't need it, but --

MS. TRIGGS: It is the third page?

MR. PEDERSON: Because I have some copies from --

MR. MATTHEWS: It will be an exhibit later on.

MR. KONRAD: It is going to be entered later on.

BY MR. PEDERSON:

Q Was the Response to Charges a factor in the determina-

tion of appropriate discipline?
A I wouldn't say not necessarily a factor, but it was certainly considered.
Q As you sit here today, is it your recollection there was any significant component of this that was considered?
A Not to my recollection.
(A document was marked as Exhibit 25)
Q Exhibit 25, please. Can you tell us what that document is?
A This is a Discipline Review Summary.
Q It is fair to say that this is put together by a lieutenant generally after the meeting to, sort of, try to summarize the discussion that was had with the chief? Is that right?
A That is correct.
Q Have you reviewed this prior to your testimony today?
A I did not.
Q If you could take a look at it today -- We will go over portions of it. First, I'd like to direct your attention to where it says "Comparables" and "None for these charges." Do you see that?
A Yes.
Q Is that consistent with your memory of the comparables discussion?
A Yes.

Q Why was it determined there were no comparables?
A This was a unique incident and to my knowledge and understanding, this sort of incident was not -- there was no prior discipline rendered on the situation before it.

MS. MC KENZIE: When you said there were no comparables --

THE WITNESS: For these specific charges.

BY MR. PEDERSON:

Q So is it correct to say that, to your knowledge, no officer has been charged with violating the DAAT training in terms of metering before. Is that right?
A Yes. That was a new type of charge that had to be considered in this situation along with the target isolation charge.
Q Very good. As much as we can break these things down, when it -- the chief did determine to issue 20 days for the metering. Is that right?
A That is correct.
Q And a termination for the failure to have target isolation. Correct?
A Correct.
Q So can you please explain to the commissioners how it is that those particular discipline decisions are

appropriate in this case?

A In regard to the 20-day suspension for the metering, the decision making on the part of the officer in respect to making sound, tactical decisions we felt not only jeopardized his life, but also the life of other officers responding, including other citizens. We all know that foot pursuits are inherently dangerous themselves and that is why we have a -- we train them, we have a standard about them and because that standard was not met by him, he put himself unnecessarily in jeopardy limiting his options to respond or have reactionary time to any type of situation that posed itself to him at that time. Like I testified earlier, it was like a cascading or a domino effect.

Q And in terms of the target isolation?

A Obviously, the degree of harm there is significant in that it was obviously -- it was obvious to us that he knew there was an innocent bystander in very close proximity to his intended target and that his lack of concern for that person's safety weighed heavily on it, but ultimately, the degree of harm is that an innocent person was shot was something to be considered with a lot of weight.

Q Was there anything else, any other factor that weighed into the decision making here?

A Yes. Another issue that we considered, too, was that he was previously counseled or reprimanded, if you will, on a foot pursuit in which he used inappropriate language and that -- and commands that were certainly not trained by the Milwaukee Police Department and we thought that incident, in close proximity to this shooting offense, was pretty relative and the specific language he was using in that incident in July of 2019 in a foot pursuit was basically giving the command of, "stop or I'll shoot you in the back."

Q Why was that an important consideration?

A That was important to us in that it, kind of, showed us a pattern of behavior, frame of mind.

Q Is there any other factor or reasoning for the decision making that you haven't already testified about that you believe the commissioners should be aware of?

A Not to my recollection at this time, sir.

MR. PEDERSON: With that, that is all I have for direct.

MR. KONRAD: Mr. Matthews?

MR. MATTHEWS: Sure.

CROSS-EXAMINATION BY MR. MATTHEWS:

Q First of all, are you aware that the Commission wants to have the chief here on Phase 2 for this type of testimony?

A I couldn't hear you.
Q Are you aware that the Commission wants the chief here for this type of testimony on Phase 2?
A I would expect the Commission would want the chief here.
Q You are not the chief. Right?
A That is correct, sir.
Q You are not even an assistant chief. Right?
A Yes, sir. That is correct.
Q You are not the decision maker.
A I am not the ultimate decision maker.
Q You don't know how the chief weighed things. Right?
A I was present with him after he was deliberating his decisions, yes, but to be in his mind, I can't specifically testify what was in his mind -- state of mind.
Q So you don't know specifically how he weighed things. Right?
A We have had discussion, so I have an idea of what things he thought were important to him in his decisions and those things, I just testified to.
Q Simple question. You don't know for sure how he weighed things. Right?
A I do know certain things he weighed. Yes, I do.
Q Do you know if the chief weighed 62.50 factors?
A I can't specifically speak to that point, no.
Q The chief can take whatever position he wants. Right?

A He can.
Q That doesn't mean it is supported by the evidence. Right?
A Technically, it should be, but if he chooses not to go -- follow the weight of the evidence, that would be his decision, yes.
Q Looking at Exhibit 25, you were asked some questions about that exhibit. Right?
A Yes.
Q And it looks like "Members Present" list a bunch of names. Right?
A Yes.
Q Your name is on there.
A Yes.
Q Do you recall if there were certain individuals in that meeting who were present that were pushing for Officer Zens to be fired?
A Yes.
Q Who were those people?
A Chief Brunson was one, Assistant Chief Regina Howard were two that I specifically remember that were in support of termination.
Q You were talking before about the foot pursuit standard. Do you remember that?
A Yes.

Q You said that Officer Zens violated the foot pursuit standard. Do you remember saying that?
A Yes.
Q What is the foot pursuit standard?
A The standard is the recommended guidelines that, obviously, you are in the right frame of mind, that you are taking a sound, tactical approach and that if you consider the circumstances, specifically in this one was that if the person is suspected to be armed or known to be armed, that you should consider that you create a safe distance or a respective distance between you and the person that you are pursuing, you don't follow in the same flight path and that you -- once you lose sight of that person, you stop, listen, look, you conduct a metering technique, to paraphrase.
Q Is counseling discipline?
A Counseling can be a non-disciplinary action.
Q Is counseling discipline?
A It can be, yes.
Q Are you familiar with SOP 870?
A I am familiar with it.
Q What is that titled?
A I don't know a specific title offhand.
Q "Suspensions/Official Disciplines." Right?
A Yes.

Q And it mentions in there that counseling is not discipline. Right?
A Yes. I am agreeing with you.
Q You'd agree with me that counseling is not discipline.
A I am agreeing that counseling is not discipline, but it can be a form of discipline or a corrective action, if you will. That's what I was trying to allude to; corrective action.
Q You just testified that Officer Zens said something or words to the effect of, "stop or I'll shoot you in the back." Right?
A Yes.
Q When did that happen?
A July of 2019.
Q Where is that mentioned anywhere in the investigation conducted by Internal Affairs?
A I don't believe it is mentioned. Not in the discovery that I have had. I have a personal copy of it.
Q Where did you get that information?
A I got that -- that would have been given to me by -- it would have been provided to me by Internal Affairs, in my personal review packet.
Q It is your testimony today that you got that information from Internal Affairs?
A Yes. It was also made available to us during the --

when we were reviewing discipline.

Q Do you know if that information was given to Officer Zens at any point?

A I can't speak to that, sir.

Q You testified about Exhibit 23. Do you recall those questions?

MR. KONRAD: Before you go further on this point, I have in my notes, "previously repri-manded." Is that the correct term? Is it counseling or reprimand or is it two different things?

THE WITNESS: A letter of reprimand would actually be a disciplinary action. A counseling would be, like, a corrective action, like an on-the-spot correction, if you will.

MR. KONRAD: What happened here was a counseling.

THE WITNESS: Yes.

MR. KONRAD: And if it were a reprimand, it would be on here.

THE WITNESS: A reprimand would be on the official discipline record. A counseling would not be.

MR. KONRAD: I will correct my notes.

THE WITNESS: I apologize.

MR. KONRAD: I don't know if it was my mistake or yours.

BY MR. MATTHEWS:

Q Just so I am clear again on the comments that you are alleging Officer Zens made, the department thought that they were -- rose to the level of not even discipline. Right?

A On the --

Q The comment -- "I'll shoot you in the back" comment. Right?

A Yes. That did not rise to the level of formal discipline.

Q And the department could have disciplined Officer Zens for that alleged comment. Right?

A Potentially, yes.

Q And officers are generally disciplined for serious comments. Right?

A They can be.

Q Would you agree with me that the department didn't think this was a very serious situation. Right?

A I can't agree with that. I would think it is serious.

Q So serious, that it got non discipline. Right?

A It is still a serious situation. That type of conduct and language we are going to take seriously and just because a formal investigation wasn't launched doesn't

mean we didn't take it seriously.
Q Looking at Exhibit 23, there are nine ratings on there. Right?
A That is correct.
Q How many are above average?
A There is a total of six that are above average.
Q How many below average?
A There are no -- zero that are below average.
Q So he has a pretty good reputation among his supervisors. Right?
A Yes, he does.
Q 66 percent above average?
A Yes.
Q Did Officer Zens use excessive force here?
A The force that he used is questionable.
Q Did he use excessive force? That is the question.
A From his frame of mind and how he articulated it, no.
Q I want to know from your frame of mind as a designee for the chief.
A My personal opinion? That was a no-shoot situation.
Q Well, you are testifying as the chief, so I want to know as the chief's opinion.
A The chief's opinion was he agreed with the -- that it was a reasonable articulation that he had the right to deploy deadly force, if I am not mistaken. That is why

he wasn't charged with that.

Q You seem to be intimating in your testimony that Officer Zens used excessive force because it was a no-shoot situation, so I want to know if he did use excessive force, whether that is the position of the department.

MR. PEDERSON: I am going to object as asked and answered. I think he's already clarified what the chief's position was versus his own.

MR. KONRAD: Sustained. I think he's explained the chief's position.

BY MR. MATTHEWS:

Q So use of force wasn't excessive, then?

A The department's position is that the use of force was not excessive.

Q What is the most severe discipline that can be handed out?

A You could be terminated.

Q A discharge. Right?

A A discharge, yes.

MR. MATTHEWS: And the Code of Conduct, if you'd turn to Exhibit 11, Page 11, let me know when you are there.

THE WITNESS: I am there, sir.

MR. MATTHEWS: Numbered Page 11.

THE WITNESS: I am sorry.

MR. MATTHEWS: Where it says "Appendix - Disciplinary Decision Process."

Q This part of the Code of Conduct goes through a series of factors. Right? That will be considered in a disciplinary decision process. Is that correct?

A That is correct.

Q And they either aggravate or mitigate the employee's conduct. Right?

A Yes.

Q I just want to be clear on the purpose. It says, "This appendix identifies factors that will be considered in the disciplinary decision process." Is that what it says?

A Yes.

Q During your testimony earlier, you said that the employment history was not a substantial factor in the decision. Right?

A Yes, sir.

Q You also said the Response to Charges weren't really a factor in the decision.

A That's correct.

Q Just working down the page on Page 11, the next paragraph, it says, "It is recognized and understood that the department members will make judgmental errors from time

to time in carrying out their responsibilities."
Do you see that?
A Yes.
Q Is that what happened here?
A Yes. That was an error.
Q Next paragraph.
"The department has an obligation to make its expectations as clear as possible to its members. The department has an equal obligation to make the consequences of failing to meet those expectations clear."
Do you believe that the department made it clear the obligations Officer Zens had with respect to target isolation?
A We invest a lot of resources, time, money in the training of officers at our training academy. I have gone through this training myself in my career. I believe the department did make that clear.
Q Looking to the next paragraph, it says,
"Disciplinary action must be imposed in a consistent and fair manner. Consistency is defined as holding everyone equally accountable for unacceptable conduct."
Do you see that?
A Yes.
Q That's what it says. Right?

A Yes.
Q And you were briefed on the testimony from Monday. Right?
A I was not.
Q Do you recall if there was testimony on Monday regarding officers and individuals getting in foot pursuits and losing sight of the suspects they were chasing?
A No one specifically briefed me on the specific testimony that occurred on Monday.
Q Have you ever been in a foot pursuit?
A I have been in many a foot pursuit.
Q Have you ever lost sight of a foot pursuit?
A I have.
Q Have you ever been disciplined for that?
A I have not.
Q Would you agree that the department is holding Officer Zens in a different light than it is holding officers such as yourself with respect to foot pursuits?
A We didn't discipline Officer Zens for losing sight of the suspect. We disciplined Officer Zens for not properly metering after losing sight of the suspect.
MR. MATTHEWS: I would direct your attention to Exhibit 15, the second page, last paragraph. Let me know when you are there.
THE WITNESS: Give me a second,

please, sir. I got Exhibit 15.

Q Second page. Last paragraph. Why don't you review it and let me know if that is consistent with what you just testified to.

A Very similar.

Q Just so I understand your testimony, you just testified that Officer Zens wasn't disciplined for failing to stop and look for the suspect after losing sight of him, but rather, for failing to meter the corner. That is what you said. Right?

A Yes.

Q And the charges say the exact opposite. Right?

A No. Okay. We are using different language here. Failed to adhere to the policy. He failed to stop and look. Stop and look can be another form of metering, sir.

Q My question was, originally, is Officer Zens being treated differently for failing to stop and look after losing sight of a suspect than other officers are such as yourself?

A Not that I am aware of.

Q You testified that this is the only time that an officer has been disciplined for failing to stop and look. Right?

A To my knowledge, yes.

Q Going back to the Code of Conduct, it lays out specific discipline factors. Right?
A Yes.
Q On Page 12, the first one, "Employee Motivation." Do you see that?
A I do, sir.
Q It says,

"Whether or not the member was acting in the public's interest. A member who violates the policy or procedure in an effort to accomplish a legitimate police purpose, and who demonstrates an understanding of the broader public interest inherent in the situation, will be given more positive consideration in the determination of consequences than one who was motivated by personal interest."

Do you see that?
A I do.
Q That is what it says. Right?
A That is what it says, sir, yes, sir.
Q Was Officer Zens -- did Officer Zens violate the policy or procedure in an effort to accomplish a legitimate police purpose?
A In a sense, yes.
Q In a sense. Look at Exhibit 25 under "Employee Motivation." What does it say?

A "Catching fleeing subject."
Q That is a legitimate police purpose. Right?
A Yes.
Q Employee motivation was for legitimate means. Right?
A Yes.
Q And that should be given a more positive consideration in determination of consequences than one who is motivated by personal interest. Right?
A Agreed.
Q And again, the discipline, the most severe discipline is a discharge. Right?
A That's correct.
Q That's what Officer Zens received. Right?
A That's correct.
Q Turning to the next page, numbered Page 13 under "Degree of Harm." In the middle of that provision, it says,

"Harm can also be measured in terms of the personal injury the error causes, such as the consequences of an unnecessary use of force."

Do you see that?

MS. MC KENZIE: Is it in the middle of the paragraph?

MR. MATTHEWS: Yes, ma'am.

A Yes, I see it.
Q You'd agree with me that Officer Zens didn't engage in

an unnecessary use of force. Right?

A I don't agree with that.

Q Did the chief disagree that the use of force was unreasonable?

A We determined that the use of force was reasonable, but it was used inappropriately in that he did not have target isolation.

Q Turning to "Employee Experience," it says,

"The level of experience of department members is a discipline factor. A relatively new member or an inexperienced member in an unfamiliar assignment will be given greater consideration when judgment errors are made."

Do you see that?

A Yes.

Q And would you agree with me that Officer Zens was a relatively new member? Right?

A Yes, sir, I would.

Q So he was supposed to be given greater consideration when judgment errors are made. Right?

A Yes.

Q You already said he made a judgment error according to you. Right?

A Yes, sir.

Q Next section. "Intentional and Unintentional Errors."

Do you see that?

A Yes, sir.

Q It says,

"Errors can be classified as intentional or unintentional. An unintentional error is an action or decision that turns out to be wrong, but based upon the information available at the time it was taken, seemed to be in compliance with policy and the most appropriate course."

Do you see that?

A What paragraph is that, sir?

Q Beginning of "Intentional and Unintentional Errors."

A Okay. I am sorry. Yes, I see it.

Q And you would agree with me that Officer Zens' actions were an unintentional error. Right?

A It was intentional, sir.

Q Intentional error.

A Yes. He discharged his firearm knowing that there was an innocent bystander standing behind his target.

Q So he intentionally made an error to hit the wrong person.

A Not intentionally made an error to hit the wrong person. He intentionally discharged his weapon when it wasn't safe to do so.

Q The question is, is the error intentional or uninten-

tional?

A Intentional by my definition.

Q The Code of Conduct continues. It says,

"Unintentional errors also include those momentary lapses of judgment or acts of carelessness that result in minimal harm."

Do you see that?

A Yes.

Q Again, you believe this was an intentional error.

A Yes.

Q Officer Zens intentionally shot Mr. Davis. Right?

A I did not say that. I didn't say he intentionally shot Mr. Davis.

Q Again, this section says,

"The consequences will be more corrective than punitive unless the same errors persist."

Right?

A Where are you at now, sir?

Q Bottom of that paragraph.

A Yes.

Q Turning to the next page. "Employee's Past Record."

Do you see that?

A Yes, sir.

Q It says,

"A member's past record will be taken into

consideration in determining the consequences of a failure to meet the department's expectations."

Do you see that?

A Yes.

Q Did I read that correctly?

A Yes.

Q It says it will be taken into consideration. Right?

A Yes.

Q And was Officer Zens' past record positive or negative?

A It was mostly positive.

Q It also says in that section,

"A member whose past record reflects hard work and dedication to the community and department will be given every consideration in the determination of any disciplinary action."

Do you see that?

A Yes, sir.

Q Is that what you guys did with Officer Zens?

A We weighed all circumstances, sir, and we considered his past record.

Q So he was given every consideration.

A He was.

Q Under "Responsibility," Officer Zens did accept responsibility for his conduct. Right?

A I am sorry. Can you repeat that?

Q The last section, "Responsibility."
A Yes.
Q I said, Officer Zens did accept responsibility for his actions. Right?
A He admitted that he fired his weapon, but the point we had an issue with was that he did not seem to exercise compassion for that person that was hit during his interviews, no, and that he didn't consider that by-stander's safety.
Q Did he express compassion in his Response to Charges?
A He did, sir.
Q Was that taken into consideration?
A We did review his Response to Charges and we certainly weighed that in our decision making.
Q We just went over every factor in the Code of Conduct. There were multiple mitigating factors. Right?
A There are some mitigating factors, yes, sir.
Q And again, the most severe discipline is discharge. Right?
A Yes, sir.
Q And that's what Officer Zens received, even though there were a bunch of mitigating factors. Right?
A Yes, sir.

MR. MATTHEWS: That is all I have.

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: Thank you.

REDIRECT EXAMINATION BY MR. PEDERSON:

Q So we have gone over a number of these factors that are outlined in the Code of Conduct. Right?

A Yes, sir.

Q Are they all given equal weight in every case?

A They are not, sir.

Q How and why do you give different ones different weight?

A Because every situation is unique, there is different variables that we have to consider, things like that.

Q Out of the factors that we went over here, is there any one particular factor that we went over that sticks out in your mind as being particularly important?

A The degree of harm, sir.

Q So I, too, would like to point you to Page 13.

A I am there, sir.

Q Yes. We read through the portion that said -- where Mr. Matthews read you the portion that said,

"Harm can also be measured in terms of the personal injury the error causes, such as the consequences of an unnecessary use of force."

Do you remember him reading that to you?

A Yes.

Q All right. I am going to read to you the next sentence.

"Another way in which harm can be measured is

the impact of the error on public confidence."

Did I read that correctly?

A Yes, sir.

Q Does that portion of the "Degree of Harm" portion in the Code of Conduct have relevance to this case?

A It does, sir.

Q How so?

MR. MATTHEWS: I'd object. It is outside the scope of direct. He could have brought that up on direct.

MR. KONRAD: I don't think we applied that scope rule here.

Go ahead.

MR. MATTHEWS: Overruled, then?

MR. KONRAD: Yes. You can follow up when he is finished.

MR. MATTHEWS: He was asked what he considered. He didn't bring this up. So now, he is being asked if he considered that and he, all of a sudden, brought it up.

MR. KONRAD: Well, we can note the contradiction and consider that when we weigh the testimony.

Go ahead.

BY MR. PEDERSON:

Q So I'd ask you if that particular sentence had bearing to this case and I believe you indicated "yes" and my follow-up is, how and why?

A Well, the chief of police has to be cognizant of holding the department accountable in the eye of the public and the public demands that their police department is accountable and that that goes into establishing legitimacy with our community -- police legitimacy.

Q Very good. Next, I'd like to direct your attention to the part where it says "Intentional/Unintentional Errors." Do you see that?

A Yes.

Q You were asked some questions regarding the portion that relates to unintentional errors. Is that right?

A Yes.

Q I'd like to direct your attention to the second paragraph where it defines "intentional error" and I'll read it.

"An intentional error is an action or decision that an employee makes that is known (or should be known) to be in conflict with law, established training, or procedures or this Code of Conduct."

Did I read that correctly?

A Yes.

Q Okay. Does that all pertain to the testimony you were

providing earlier?

A Yes.

Q How so?

A Well, like I stated earlier, he was cognizant of the fact there was an innocent bystander standing behind his intended target when he made the decision to deliver deadly force.

Q And that would be in conflict with the training that he should have known regarding target isolation?

A Yes.

MR. PEDERSON: Very good. That is all I have for follow-up.

MR. KONRAD: Mr. Matthews?

MR. MATTHEWS: Sure.

RECROSS-EXAMINATION BY MR. MATTHEWS:

Q Turn to Exhibit 25, please.

A I am there, sir.

Q That is the Discipline Review Summary. Right?

A Yes, sir.

Q You were asked a question about "Degree of Harm." Right?

A Yes.

Q Do you see what is listed on "Degree of Harm" there?

A Yes.

Q What is it?

A It says "bystander unintentionally shot."
Q Then you were asked a question about the portion in the Code of Conduct under "Degree of Harm" regarding another way degree of harm can be measured is impact on the error on public confidence. Right?
A Yes.
Q That is not listed on the Discipline Review Summary. Right?
A It is not.
Q It must not have been that important. Right?
A That is not correct, sir. I did not draft this document.
Q You'd agree with me if it was important, it would be on the form. Right?
A It should be on the form, but it is not. That doesn't mean it is not important.
Q And it was so important, that you failed to mention it the last time you testified on direct. Right?
MR. PEDERSON: Objection. Argumentative.
MR. KONRAD: He can ask questions, since it was brought it up afterwards.
A The fact that I failed to mention that, sir, does not diminish the importance of that factor.
Q It was just your testimony that Officer Zens' error was

an intentional error because he should have known that he didn't have target isolation. Right?

A He should have known. Yes, he did not have target isolation.

Q Is there an exception to that?

A There is; the greater danger exception, sir.

Q And is it your position right now that the greater danger exception did not apply?

A That is my position.

Q And is it your testimony today that Officer Zens was wrong in his perception that it applied?

A That is contrary to the position of the department.

Q So are you saying that Officer Zens acted unreasonably when he made the decision to return fire?

MR. PEDERSON: Objection. Conflicts with the evidence.

BY MR. MATTHEWS:

Q When he made the decision to discharge his weapon.

A Yes. It was an unreasonable decision to make with an innocent bystander standing in proximity to his intended target.

Q So anytime there is an innocent bystander, you can't shoot. Right?

A I didn't say that.

Q I am asking.

A There may certainly be a situation where you have to shoot. But in this situation, there was not. It was not reasonable.

Q And at the time of the incident, Officer Zens should have known that.

A Yes.

Q His perception otherwise was unreasonable is what you are saying.

A Yes, relative to the innocent bystander.

Q You have no expertise in this area. Right?

A Just my personal experience and training, but no, I am not an expert at all.

MR. MATTHEWS: That is all I have.

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: No redirect.

MR. KONRAD: Commissioners? Nothing from Commissioner McKenzie, Commissioner Cocroft or Crouther? Okay. No questions.

Thank you.

(Witness excused)

MR. PEDERSON: With that, the chief would rest Phase 2.

MR. KONRAD: All right.

Mr. Matthews?

MR. MATTHEWS: I'd request a brief

recess.

MR. KONRAD: We will take a ten-minute break here. Is that enough, or do you want more?

MR. MATTHEWS: I'd like to discuss timing.

(Discussion off the record)

MR. KONRAD: Thank you. We have had to discuss scheduling and I think the result is that we will end the testimony today and continue on Monday, December 28, and we are setting aside 8:30 until noon. Until that time, we will stand adjourned.

(WHEREUPON, THE PROCEEDINGS ADJOURNED AT 3:35 P.M.)

MR. KONRAD: Good morning. It is Monday, December 28, at approximately 8:40 a.m. This is Day 3 of the continuation of the discipline appeal hearing in the matter of the Nikolas Zens addressing Milwaukee Police Department's Personnel Order 2020-76. My name is Rudolph Konrad. I am the hearing examiner presiding over this matter. Fire and Police Commissioners who are serving on the hearing panel are Vice-Chair Commissioner Angela McKenzie, Commissioner Fred Crouther and Commissioner Everett Cocroft.

We will now continue with Phase 2 of the proceedings and we will begin. Could we have the appearances of counsel for the appellant?

MR. MATTHEWS: Brendan Matthews and Rebecca Meyer of Cermele and Matthews. Also present is the appellant, Nikolas Zens.

MR. KONRAD: Thank you. For the city?

MR. PEDERSON: For the city, Deputy City Attorney Robin Pederson. Also with me is Lieutenant Liam as my -- Lieutenant Liam Looney as my court officer.

MR. KONRAD: Thank you. Where we left off, Mr. Matthews was beginning his portion of the

Phase 2 of the proceedings. Am I correct on that?

MR. MATTHEWS: Correct.

MR. PEDERSON: Yes.

MR. KONRAD: Are you ready to proceed, Mr. Matthews?

MR. MATTHEWS: We are. We call Inspector Formolo. We ask that he be treated as a hostile witness.

MR. KONRAD: Since he testified for the city, he can be treated as a hostile witness.

I guess we will swear you in again.

PAUL FORMOLO, having been first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth testified as follows:

MR. KONRAD: The witness is sworn.

RE-RECROSS-EXAMINATION BY MR. MATTHEWS:

Q Inspector, you testified previously in this hearing as the chief's designee?

A Yes, sir.

Q And which chief was that?

A That would be Chief Alfonso Morales.

Q And during that testimony, prior to giving it, you swore to tell the truth, the whole truth and nothing but the truth?

A Yes.

Q You agree you did not do that. Right?
A I agree I provided information that wasn't accurate.
Q I want to go over your testimony. You have testified that the goal of a foot pursuit is to apprehend the suspect. Do you remember saying that?
A Yes.
Q You'd agree with me you have to catch the suspect to apprehend them. Correct?
A Yes.
Q And you catch a suspect by closing distance on them until you catch up with them. Right?
A Yes, sir.
Q You can't immediately catch someone if you create distance between yourself and the person you are chasing. Right?
A That is correct.
Q You testified that Officer Zens should have stopped trying to catch the fleeing violent suspect and, instead, create distance between himself and the suspect. Right?
A Yes, under those circumstances.
Q Is that still your position today?
A Yes.
Q And it is your position that officers in the Milwaukee Police Department are trained to create distance between

themselves and someone they are chasing in a foot pursuit?

A If it is warranted as in instances when a person is suspected to be armed or known to be armed, yes, that is my position.

Q And officers that have failed to follow that alleged training have been disciplined?

A Not to my knowledge.

Q You are not aware of any other officers other than Officer Zens being disciplined for such conduct?

A That is correct, sir.

Q And you'd agree with me that officers get in foot pursuits every single day. Right?

A Yes.

Q Are you familiar with SOP 460. Right?

A Yes.

Q What SOP is that?

A That is the SOP covering the disciplinary process.

Q I believe --

A Use of force.

Q And in that SOP, where does it say that officers are supposed to create distance in foot pursuits?

A I'd have to reference that SOP.

MR. MATTHEWS: I only have one copy and it is a redacted copy because, again, none were

provided to me. I am happy to show the witness the one copy I have with the permission of the hearing examiner.

MR. KONRAD: Sure.

MR. MATTHEWS: Here you are, Inspector.

THE WITNESS: Is there a specific day you would like me to reference or --

MR. MATTHEWS: I don't think that the information is in there, but I'd like you to look at it for yourself and confirm that information.

MR. KONRAD: Does that have a number?

MR. MATTHEWS: It is SOP 460.

MR. KONRAD: Is there an exhibit number?

MR. MATTHEWS: Not yet. I wasn't planning to introduce it.

MR. KONRAD: All right.

MR. MATTHEWS: It was not provided.

MR. PEDERSON: 460 is Exhibit 21.

MR. MATTHEWS: Then we can use that one. I misspoke.

MR. COCROFT: Examiner, we are having technical difficulties here, so if someone could come in here immediately and fix it. We can't see the

witness and we are having trouble.

MR. KONRAD: We will suspend the hearing until we fix it.

(Discussion off the record)

BY MR. MATTHEWS:

Q Are you finished with your review?

A Yes, sir.

Q Did you locate anything in SOP 460 regarding foot pursuits?

MR. KONRAD: You asked if there is anything on foot pursuits.

A Sir, I reviewed SOP 460, approximately 13 pages, just reviewed over the boldface titles and I did not see a category entitled "foot pursuits."

Q Would you agree with me that SOP 460 is the department's official use of force policy?

A It is the department's use of force policy.

Q It would cover anything relevant to foot pursuits. Is that fair?

A No, it covers use of force. Foot pursuits is not use of force.

Q Where would use of force policy -- the foot pursuit policy be found?

A It would be in the Tactical Response manual.

Q And that is a state training guide. Correct?

A Yes.
Q And I believe that is Exhibit 8?
A I'd have to check. Yes.
Q Just so I'm clear before I ask you any questions on Exhibit 8, it is your testimony today there is no policy specific to the Milwaukee Police Department regarding foot pursuits?
A We are trained with the Tactical Response manual.
Q So the question is, is there a policy?
A There is not a specific foot pursuit policy per se.
Q Is there any policy created by the Milwaukee Police Department regarding foot pursuits?
A No.
Q Do you have Exhibit 8 in front of you? You already testified about Exhibit 8. Right?
A I have.
Q In it -- we don't need to go over this again, but it says it is general guidelines. Right?
A Yes. We covered that, sir.
Q You testified that the situation involving Officer Zens was a no-shoot situation. Do you remember saying that?
A Yes.
Q Just so I am clear, are you familiar with Graham v. Connor?
A I am not.

Q It is a United States Supreme Court decision regarding use of force.
A I will take your word for it.
Q Specifically a portion that reads,
"The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene rather than with 20/20 vision of hindsight."
Are you familiar with that language?
A I am familiar with that concept. I can't say that I ever heard that exact language before, sir.
Q And that concept is known colloquially as Monday morning quarterbacking. Right?
A Yes.
Q And you are not supposed to Monday morning quarterback. Right?
A As executives and commanders, we are supposed to and we are obligated to conduct a review of actions that are taken by the members of the Milwaukee Police Department. It is our responsibility.
Q Is that consistent with the quote I just read from Graham v. Connor?
A Not necessarily.
Q You'd agree with me that what you have done is Monday morning quarterback Officer Zens' actions. Right?

A I don't like to use the term "Monday morning quarter-back." I felt this is a serious incident that warranted the review of the executive command of the police department to provide transparency and accountability of our actions.

Q You are basing your decision in this case with 20/20 hindsight. Right?

A Yes, sir, because I am not there.

Q I want you to assume that Brown had a gun and turned around and fired at Officer Zens. Is this still a no-shoot situation, then?

MR. PEDERSON: I am going to object to this line of questioning. I concur that when this witness was asked his personal opinion, he did provide that opinion, but he also said that is not the position of the police department, so I think this is a line of questioning that simply does not apply to the decision at issue here.

MR. KONRAD: It is cross-examination and he is trying to track his credibility.

So go ahead.

A Can you repeat the question?

Q Yes. I asked you to assume Brown had a gun and turned around and fired at Officer Zens. Is that still a no-shoot situation in your mind?

A Not in my mind, no.
Q So you would allow Officer Zens to shoot in that situation?
A Yes.
Q And we only know that Brown had a gun because of 20/20 hindsight. Right?
MR. KONRAD: You mean didn't have a gun.
MR. MATTHEWS: Correct. I am sorry.
A Brown didn't have a gun, sir.
MR. MATTHEWS: Correct. Sorry.
Q We only know that with 20/20 hindsight. Right?
A Well, the fact of the incident itself.
Q We only know that because we learned that after the fact. Right?
A That is correct.
Q That is the same as 20/20 hindsight. Right?
A In essence.
Q Well, in essence, I am asking if it is -- I am asking you if it is the same thing.
A To me, you are mincing words, sir. The facts of the case showed that there wasn't a gun present, so, in essence, if you are not present, you rely on those facts to provide you insight.
Q Did Officer Zens know there wasn't a gun?

A At what point?
Q At the point that he discharged his weapon.
A I don't know. I can't answer that for him.
Q Did anyone in -- You reviewed the file. Right?
A I reviewed the file.
Q Did anyone determine in the file that Officer Zens knew that Brown didn't have a gun and still discharged his weapon?
A Not that I recall.
Q Did every opinion show that Officer Zens believed that Brown had a gun when he discharged his weapon?
A Yes, that is correct.
Q No one said that that perception of Officer Zens is unreasonable. Right?
A In relation -- in respect to that, no.
Q You testified that another issue that was considered was a prior foot pursuit of Officer Zens. Right?
A Yes.
Q You testified that prior incident was, "pretty relative," to the current incident. Right?
A Yes.
Q And you testified that the specific language used by Officer Zens was "to stop or I'll shoot you in the back." Right?
A Yes, I did.

Q You base that testimony on a review of Sergeant Mengel. Right?
A On a report that he submitted, yes.
Q You also testified based -- Did you review the body cam before you made that testimony?
A I didn't review the body cam before the testimony; just the report.
(A document was marked as Exhibit 26)
Q Inspector, I am showing you what's been marked as Exhibit 26. Have you seen that document before?
A I have, sir.
Q Is that the memo we were just discussing?
A Yes, sir.
Q Can you tell me if it says anywhere on there, "stop or I'm going to shoot you in the back"?
A It does not, sir.
Q On the second full paragraph, the last line, there's a specific quote as to what Officer Zens said. Right?
A I am sorry. You said the very last paragraph or second?
Q Second full paragraph. Last line.
A Yes, sir. Yes.
Q What did Officer Zens say in quotes?
A "I'm going to shoot you."
Q Officer Zens didn't say "I'm going to shoot you in the back." Right?

A Yes, sir.
Q That language is nowhere on this document. Right?
A That is correct, sir.
Q You testified that the specific language, which was, "stop or I'll shoot you in the back" was an important consideration in leveling discipline against Officer Zens. Do you remember saying that?
A I remember saying that this report itself was relative.
Q Well, you didn't testify about the report at all, so are you sure about that?
A I am sorry. Can you say that again?
Q You didn't testify about the report at all previously, so are you sure that you testified about it?
A I did testify about this report.
Q You testified about Sergeant Mengel's report, Exhibit 26?
A Yes, I did.
Q What did you say about it?
A I said that something to the effect that the report reflected, "stop or I'm going to shoot you in the back." That was testified to on December 18.
Q We can play the video if we need to, but you specifically were asked a question by Deputy City Attorney Pederson whether or not the quote that you provided which was, "stop or I'll shoot you in the back" was an

important consideration in disciplining Officer Zens and you answered yes. Do you remember saying that?

A Yes.

Q You also testified that that specific language showed you a pattern of behavior and frame of mind from Officer Zens. Do you remember saying that?

A I do.

Q The memo I just showed you was not provided to Officer Zens at any point prior to your testimony. Right?

A This memo was provided to him?

Q It was never provided.

A I can't say that.

Q And even during your testimony, it wasn't marked as an exhibit. Right?

A It was not marked as an exhibit.

Q But you just testified that you testified about it. Right?

A I did, sir.

Q So it wasn't mentioned in your prior testimony, but you testified about it. I just want to be clear about that.

A That is not accurate. I testified to this report. I don't know how to say it otherwise. I testified to the existence of this report.

Q Is it your testimony today that you mentioned this report in your prior testimony?

A Yes. This is a report that I was testifying to during the -- when I believe I was asked if there was anything else that we considered when we were rendering our final decision for discipline and I mentioned this report, sir.

MR. MATTHEWS: I'd like you to pull up Exhibit 24.

MR. PEDERSON: Was that 24 you said?

MR. MATTHEWS: Correct.

THE WITNESS: I have it, sir.

Q What is that document?

A This is the "Investigation Employee Case File History."

Q Is this commonly referred to as a "hard card"?

A Yes, sir.

Q It lists all the official disciplines of Officer Zens. Right?

A Yes.

Q I believe the incident we were just discussing occurred in July of 2019. Right?

A Yes.

Q It is not listed on the hard card. Right?

A That's correct.

Q That is because it wasn't discipline. Right?

A That is correct.

Q But you testified it was an important consideration,

though. Right?

A Yes. Chief Morales, among others, felt that this was very important.

MR. MATTHEWS: I'd like you to pull up Exhibit 25. Let me know when you have it.

THE WITNESS: I have it.

Q What is that document?

A This is the "Discipline Review Summary."

Q You'd agree with me that it should list all important things that were reviewed and discussed. Right?

A Yes, sir, it should.

Q You'd agree with me that it doesn't list anything about the July, 2019, incident. Right?

A It does not.

Q In fact, when you testified about Exhibit 25, you didn't mention the July, 2019, incident, either. Right?

A Not when I was testifying to this document, no.

Q You were specifically asked a question about what was reviewed during the Discipline Review Summary. Do you remember answering that question?

A I remember in generalities, yes.

Q You didn't mention the memo by Sergeant Mengel. Right?

A I did mention it, but obviously, not at this exact time.

Q When you were asked questions about Exhibit 25, you didn't mention the counseling in July of 2019. Is that

fair?

A Yes.

Q You also didn't mention the memo by Sergeant Mengel from July of 2019. Is that fair?

A Correct.

Q After your testimony last Friday, I reached out to you to discuss the shoot-in-the-back portion of your testimony. Is that right?

A Yes, sir. We had a conversation.

Q We didn't discuss anything else. Right?

A That is correct, sir.

Q You advised me if you had perjured yourself, you'd go back on the record and correct it. Right?

A I didn't use the word "perjure," but I did agree that if I said something -- stated something that was inaccurate after having an opportunity to review the document, I would certainly come here and set the record right, which is what I am here doing today.

Q You didn't reach out to me to correct your untruthful testimony, though. Right?

A I did not reach out to you.

Q And you didn't reach out to Deputy City Attorney Pederson to correct your untruthful testimony. Right?

A I did have a conversation with him after we spoke. I felt I am obligated to inform him of our conversation

and of what occurred. I let him know.
Q You never reached out to him before I talked to you. Right?
A Yes, sir, that is correct.
Q And deputy City Attorney Pederson didn't reach out to you to correct your untruthful testimony, either. Right?
A That is correct.
Q And you advised me that you would get back in touch with me after you re-reviewed the information to let me know if you were going to correct your testimony. Right?
A Yes.
Q And I didn't hear back from you until yesterday when you texted me and said you would be present today. Is that favor?
A That is fair.
Q Are you aware that you are present today because I had you subpoenaed?
A Yes. I would have been here regardless.
Q Do you stand by your prior testimony that Officer Zens said, "stop or I'll shoot you in the back"?
A I don't. I retracted that.
Q So you admit that you were untruthful under oath. Right?
A I would not state "untruthful." I provided inaccurate

or testimony that was not necessarily -- that was not reflected in the report, but it was not meant to intentionally deceive or sway the Commission in any manner.

Q You agree that it did persuade or otherwise influence the Commission, though. Right?

A I have no idea if that swayed the Commission in any manner, but I understand that the Commission would, obviously, consider that testimony.

Q You would admit that your untruthful testimony prejudiced Officer Zens. Right?

MR. PEDERSON: Objection. I am going to object to the term "untruthful." The witness already said numerous times he was not untruthful.

MR. KONRAD: Well, first of all, what the lawyer says isn't evidence. He can explain that he believes his answer was inaccurate. I will sustain the objection because it does create -- by repeating it, he is coloring it in a way that is not quite consistent with the witness's testimony. I think the witness's own testimony is inaccurate.

BY MR. MATTHEWS:

Q You admit that your inaccurate testimony prejudiced Officer Zens?

A Potentially.

MR. MATTHEWS: I would ask the hearing examiner to direct the commissioners that the inspector lied under oath regarding what Officer Zens said during the foot pursuit in July of 2019. That's number one. Number two, I would ask the hearing examiner to direct the commissioners that persons present considered false and inaccurate information in rendering discipline against Officer Zens. I would also ask the hearing examiner to direct the commissioners that the chief's decision was based on misinformation at a minimum.

MR. KONRAD: We will discuss those issues when we are deliberating.

MR. MATTHEWS: That is all I have for this witness.

RE-REDIRECT EXAMINATION MR. PEDERSON:

Q Inspector Formolo, during your testimony at any point throughout this entire hearing, did you ever knowingly provide false information?

A No, sir.

Q Have you, as you sit here today, discovered that you previously provided inaccurate information?

A Yes, sir, I did.

Q Can you, please, indicate all the inaccurate information that you believe you previously provided?

A Yes, sir. Referring back to Exhibit No. 26, I stated "in the back" and that language is not in that report.
Q Is there anything else?
A No, sir.
Q What was the cause of you providing that inaccurate information?
A Contributing to that is you are trying to -- or I was trying to recollect the contents on that report. Oftentimes, when you are providing testimony, you are paraphrasing, trying to provide a synopsis of written accounts or even verbal accounts on occasion, and that is what occurred there. It certainly was not intentional and it was inaccurate. If I would, obviously, have had the document here in front of me to recollect my memory to assist with that, it certainly would have been avoided.
Q Is it your memory that there was a similar error made when the chief considered the discipline?
A No.
Q Despite the fact that there was no reference to shooting someone in the back, is it your recollection that this -- the contents of what occurred here was a consideration of the chief?
A Yes. This is what we use when we are deciding how to proceed with discipline.

Q Despite there being no reference to shooting someone in the back, why is it that this was still a consideration?
A Again, it was in consideration because it provided a frame of mind, a pattern of behavior and it just, kind of, added to the totality of the circumstances.
Q Did anyone tell you to testify in the manner you did regarding shooting someone in the back?
A No, sir.
Q Did you have conversations with anyone prior to that testimony regarding that?
A Regarding --
Q That particular statement.
A No, sir.

MR. PEDERSON: That is all I have.

MR. KONRAD: Mr. Matthews?

MR. MATTHEWS: Just quickly.

RE-RE-RECROSS-EXAMINATION BY MR. MATTHEWS:

Q On that point, I think, Inspector Formolo, you just testified that if you would have had the memo in front of you, you wouldn't have testified the way you did. Is that fair?
A Yes.
Q As soon as you left the hearing on Friday, did you not have the memo in front of you and review it?
A I had the memo in my possession, but I didn't review it

first.

Q You didn't have a discussion with Lieutenant Looney about it at that time?

A We had a discussion, but I can't remember if it was about this memo or otherwise. Even if we did have a discussion, we wouldn't have been speaking about specifics of my testimony.

MR. MATTHEWS: That is all I have.

MR. PEDERSON: No redirect or follow-up.

MR. KONRAD: Do the commissioners have any questions? We will start with Commissioner McKenzie.

MS. MC KENZIE: I just have a quick question as to I think that the language of shooting someone in the back is very specific, you know, and so I am, kind of, wondering, where would you have come up with that language if it is not necessarily in any documentation that we have been provided with so far and documentation I am assuming that you have in your review. Where would you have come up with that language?

THE WITNESS: The only thing I can think of, Commissioner, is that as I was testifying, you know, when -- again, you are trying to paraphrase and

provide a synopsis and I suppose that what was going through my mind was that it's inferred when you are in a foot pursuit, that when you say that you are going to shoot some somebody while engaged in a foot pursuit, their back is to you and when you say you are going to shoot somebody in a foot pursuit, it is just implied and inferred that you are shooting somebody in the back. That is the only explanation I can provide you, Commissioner, as to how that came in my mind. And again, I apologize.

MS. MC KENZIE: Okay. And then -- With that being said, you testified that there was a type of pattern that you saw with this particular officer that led to the type of discipline that he received. Is that fair?

THE WITNESS: Yes.

MS. MC KENZIE: Is that a fair summary?

THE WITNESS: Right. I remember the conversation being that he was just reprimanded -- I shouldn't say "reprimanded" -- counseled on this type of behavior and here we are a couple months later in this situation.

MS. MC KENZIE: I have nothing further.

MR. KONRAD: Commissioners Crouther or Cocroft?

MR. CROUTHER: I have one question. This Exhibit No. 26, is everything correct in this report except shooting in the back?

THE WITNESS: That is correct, Commissioner. From the information I had, that is correct.

MR. CROUTHER: Okay.

THE WITNESS: I just want to let everyone know that the date on here, the July 23, 2019, that is the date that the actual counseling occurred. The actual incident occurred on -- I believe it was July 13. So there was a period of time that had lapsed between when the infraction occurred to when the officer was counseled on it.

MR. CROUTHER: Okay. Thank you.

MR. MATTHEWS: Could I piggyback off of that?

MR. KONRAD: Let's see if Crawford has anything and then we will go back to the lawyers.

MR. COCROFT: It's Cocroft.

MR. KONRAD: I'm sorry. Go ahead.

MR. COCROFT: I was just looking at

the -- Exhibit 26. It uses the term "motherfucker." Right? And then "I am going to shoot you." It doesn't say, "stop or I am going to shoot you in the back" as you testified to, but there is no context when he used the "motherfucker." Was it, "motherfucker, I am going to shoot you in the back" or, "motherfucker, I'm going to shoot you" or, "I am going to shoot you, mother-fucker?" It doesn't say. So it is, kind of, like hard to put this into context. Or is he just screaming, you know, "motherfucker, I'm going to shoot you"?

THE WITNESS: Yes, Commissioner. I -- I didn't draft this report. I did -- prior to coming here this morning, I listened to the audio version of the body worn camera, but it wasn't that clear to me. But somebody else would have to testify to that, sir.

MR. COCROFT: Okay. Thank you.

MR. KONRAD: No further questions. Go ahead.

MS. MC KENZIE: So, upon reviewing this memo, I guess my question then is, it seems as if the formal discussion with him as -- the formal discus-sion with Officer Zens regarding his unprofessional use of profane language is the only issue, then, that stood out in any kind of informal discipline. So, I guess,

where I am going with that is, I am not understanding what the pattern is. Does that make -- Do you understand the question?

THE WITNESS: Yes.

MS. MC KENZIE: Because this use of bad language versus what he did for the purpose of this hearing are two different things. I am not understanding that.

THE WITNESS: I guess, it was just the frame of mind, the -- the -- I can't recall exactly if profanity was used immediately preceding the incident where the shooting occurred, but I recall that this was a concern for Chief Morales, Chief Brunson and also, some other people in the room, Assistant Chief Regina Howard at the time. This was a point of concern for them, along with everything else.

MS. MC KENZIE: Okay. Thank you.

THE WITNESS: If "pattern" is not the correct terminology, I would just say it was a concern -- another concern.

MS. MC KENZIE: Okay.

MR. KONRAD: Mr. Matthews?

MR. MATTHEWS: First, Commissioner Cocroft's question. Sergeant Mengel is here. I believe we are going to call him next, or soon, so he can answer

any questions on Exhibit 26 because he is the one that drafted it.

To Commissioner Crouther's question also regarding Exhibit 26, I just want to be clear. Everything in Exhibit 26 is correct. The shooting-in-the-back portion never happened, so that is why it is not in the memo. I believe the question from Commissioner Crouther was, is everything correct but the shooting-in-the-back portion? I just want to make clear that the shooting-in-the-back portion never happened, so that is why it's not in the memo. The memo summarizes what actually happened, just so we are all on the same page. So the memo itself is correct as far as what occurred. Other things are inaccurate, if that is the way you'd like to phrase it.

MR. KONRAD: It does refer to an incident that occurred July 13. Correct?

THE WITNESS: The actual incident date, location, time, unfortunately, are not reflected in this memo.

MR. KONRAD: Thank you.

MR. MATTHEWS: That is all I have. I don't have any questions. I just wanted to clarify that.

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: Nothing further.

MR. KONRAD: Commissioners?

All right. Thank you.

(Witness excused)

MR. MATTHEWS: Attorney Meyer is going to take the hot seat.

MS. MEYER: We'd next call Officer Jose Flores to the stand.

JOSE FLORES, having been first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth testified as follows:

MR. KONRAD: The witness is sworn.

DIRECT EXAMINATION BY MS. MEYER:

Q Please state your name, spelling the last for the record, please.

A Jose Flores. J-o-s-e F-l-o-r-e-s.

Q What is your occupation?

A Police officer.

Q And how long have you been a police officer?

A A little over five years.

Q And where are you currently assigned?

A District 7, late shift.

Q Do you know Officer Zens?

A I do.

Q How do you know him?

A He was my partner on captain's car.
Q For how long were you guys partners?
A Approximately a year and a half.
Q Is Officer Zens a good officer?
A Yes, ma'am.
Q Is he an asset to the police department?
A Yes, ma'am.
Q Is he an asset to the community of Milwaukee?
A Yes, ma'am.
Q If he was brought back and became your partner again, would you feel comfortable again with him being your partner?
A Yes, ma'am, absolutely.
Q Why?
A Several reasons. I got to witness his character. Like I said, I worked with him for a year and a half. During that time, you know, we were on the captain's car, which is an appointed assignment. Not everybody gets to be on that squad. Furthermore, being available and not taking regular dispatch assignments unless we were responding to Priority 1 incidents, so we'd get there sooner, so I witnessed him give CPR to individuals, I witnessed him flip over burning cars after vehicle pursuits, I witnessed him counsel, you know, individuals who were -- just had their house burned down by a fire. Domestic

violence victims, you name it. I seen him use his training time and time to serve others. Also, I -- I served in the United States Marines, so I had the opportunity to serve several people, men and women, and have the honor to be a cop as well. So I served a ton of people and people like Officer Zens, he just has the desire to keep other people safe, including myself. So he is an asset to the department and to me.

MS. MEYER: Thank you. I have no further questions.

MR. PEDERSON: I have no cross.

MR. KONRAD: Commissioners?

MS. MC KENZIE: How long were you on the captain's car?

THE WITNESS: I was assigned captain's car for two years and then I got off the captain's car because I was assigned to the Criminal Investigation Bureau as a police officer.

MS. MC KENZIE: You said your background is a Marine?

THE WITNESS: Yes, ma'am.

MS. MC KENZIE: To your knowledge, are -- when police officers are assigned that detail, are -- a lot of them, do they have military backgrounds?

THE WITNESS: No, ma'am, I don't

think -- I think it is just for officers who have a willingness not only to learn, but to -- that are just willing to go above and beyond and not just take dispatch assignments, but to really -- The other thing the captain's car does is handle automatic complaints and we serve as a -- as a prelude to the captain. That is our job. That is what we do. We focus on that specific area, whether it be shots fired, a shooting, just reckless driving. So we try to concentrate on that area. So people who are assigned to that are people who go above and beyond and investigate those incidents.

MS. MC KENZIE: Let me ask you this. It seems that you were a police officer for five years. Within your five-year period, when were you assigned to captain's car? Like, your second year? Third year?

THE WITNESS: Two and a half years.

MS. MC KENZIE: So when you were an in your second year, you were assigned there and you spent two years there.

THE WITNESS: Approximately, ma'am.

MS. MC KENZIE: Let me ask you this. I don't know anything about the captain's car. My assumption is for someone who has only had two years of experience to be assigned to such an important position, what is your understanding of what the necessary

requirements are, because two years is not a long time.

THE WITNESS: Sure. I can understand that. We are a very young department. Our attrition rate, officers are leaving all the time which gives younger officers opportunity to serve in those capacities and from my personal opinion, it's the application. You can be the most knowledgeable person in the world, but you are not going to go above and beyond investigating crimes and there is younger officers willing to do that, so then you will be sought out and appointed to those positions.

MS. MC KENZIE: Let me ask you this. From what you described, the captain's car appointment means that you are probably given very difficult assignments sometimes?

THE WITNESS: We conduct preliminary investigations, but anything that rises to the level of major felonious crimes, the Criminal Investigation Bureau is going to come out for those. So we get there, we get the preliminary investigation done and mainly, we are available for that, so we are not -- you know, we are not necessarily taking, you know, the traffic hazards. We are available to respond to that shooting first and then get all that preliminary investigation for the Criminal Investigation Bureau.

Anything that rises to the level of a major felonious crime most likely can be handled by the CIB.

MS. MC KENZIE: CIB? Handled by who?

THE WITNESS: Criminal Investigation Bureau.

MS. MC KENZIE: I don't have anything further.

MR. KONRAD: Thank you. Any further questions?

MR. PEDERSON: None.

MR. KONRAD: Thank you, Officer.

(Witness excused)

MS. MEYER: Next, we'd like to call Sergeant Matthew Mengel.

MATTHEW MENGEL, having been first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth testified as follows:

MR. KONRAD: The witness is sworn.

DIRECT EXAMINATION BY MS. MEYER:

Q What is your occupation?

MR. KONRAD: Could we have a name?

Q Please state your name, spelling the last for the record.

A First name is Matthew. M-a-t-t-h-e-w. Last name is Mengel. M-e-n-g-e-l.

Q What is your occupation?
A I am a police sergeant for the Milwaukee Police Department.
Q How long have you been with the Milwaukee Police Department?
A Over 13 years.
Q How long have you been a sergeant?
A Two and a half years.
Q Where are you currently assigned?
A District 7 on the late shift.
Q Do you know Officer Zens?
A I do.
Q How?
A He was assigned to District 7 between July or September of 2018, I believe, and I was his supervisor.
Q And you were his supervisor for that whole time?
A Yes.
Q As part of your supervisor role, you counseled officers. Is that correct?
A Correct.
Q I want you to look at Exhibit -- the last exhibit, Exhibit 25? 26, sorry. Is that one such counseling session?
A Yes.
Q Did you review the body worn camera before you gave that

counseling session?
A I did.
Q What type of language did Officer Zens use?
A The language that I put in quotes on the memo.
Q That is not all the language he used, just the language that you had issues with. Is that correct?
A That is correct.
Q Have you, as a supervisor, had a chance to know of other officers using similar language?
A Yes.
Q With the language that Officer Zens used, you thought that he should be given a non-disciplinary counseling session. Is that correct?
A Correct.
Q He, himself, reported that he used the language in this case. Is that correct?
A Yes.
Q Without him self-reporting, would you have known about it?
A Eventually, I would have found out when I viewed the body camera -- as a result of the body camera video as a result of the use of force and pursuit.
Q But because Officer Zens self-reported, you knew about it sooner and you were able to handle it sooner. Is that correct?

A I didn't handle it any sooner. I wanted to see for myself, but him taking the responsibility and approaching me about it gave me foresight as to what to look for, yes.

Q You also gave him a non-disciplinary counseling for his language in this current case, too. Correct?

A Yes.

Q Is Officer Zens a good officer?

A Yes.

Q Is he an asset to the police department?

A Yes.

Q Is he an asset to the City of Milwaukee?

A Yes.

Q Would you welcome him back if he were to become a police officer again?

A Yes.

Q And if he was brought back, would you feel comfortable supervising him again?

A I'd take him on my team any day, yes.

MS. MEYER: I have no further questions.

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: Thank you.

CROSS-EXAMINATION BY MR. PEDERSON:

Q Sergeant, are you aware why Officer Zens reported

himself to you regarding this?
A No. Maybe because we made it a point to counsel or talk to officers when we observe that type of language on body worn camera because it does look not aesthetically pleasing to see officers use that type of language, so I can assume that he felt the need to let me know about it right away.
Q What was your issue with his statement to the person he was pursuing, "I'm going to shoot you"?
A My issue is, again, that it doesn't -- it is not aesthetically pleasing and it can be misconstrued, I guess, in a situation like this where he used -- was forced to use deadly force and people can look at this in the history and there was a premeditation or any type of thought to that point.
Q A few times now, you have used the phrase "aesthetically pleasing." I am not certain I know what you mean by that. Can you explain what you mean by the use of that term?
A It is disturbing when you see it on video. Somebody might use colorful language when they are talking to one another and it doesn't seem odd or wrong at the time, but then when you -- I know in my case when I see stuff -- when I see on video or I hear myself recording not using appropriate language, it is embarrassing. It

doesn't look good.
Q When he self-reported to you, what specifically did he say about his comments?
A I can't remember exactly. I did put in the memo that he -- Let me review the memo here. I can't remember exactly what he said to me at the time when he reported it, but he alluded to me that he did use profane language.
Q So based on your testimony -- And I'm just putting this together based on what you told me, I don't know anything, so I'm just asking. Based on your testimony, is it correct to say, then, that the reason why he came to you ahead of time is because he knew you'd be reviewing the use of force and he knew that you would see that and he wanted to get ahead of that and report himself to you?
A Probably.
Q Is that something that an officer can be disciplined for?
A For using profane language?
Q Just his statements that are reflected in this report, and his conduct.
A Profane language, at some point, if it continues to be an issue, yes, or --
Q Well, I am less concerned about the profane language.

I am more concerned about the "I'm going to shoot you."

A The "I'm going to shoot you," it depends on the context in which it is used. I know, in some cases, it can be used as heavy control talk where you are threatening the use of force to gain some type of compliance and in this case, my recollection, the individual that Officer Zens was pursuing, upon hearing that stuff, did stop running.

Q And, in your experience, have you had someone who continued to have these sorts of incidents pop up again and again?

A As far as -- as far as the threatening to use force or the --

Q Yes.

A Threatening to use force, not so much that I can -- that I can recall, at least in the body worn camera era where now, everything you do is recorded.

MR. PEDERSON: That is all I have.

MR. KONRAD: Ms. Meyer?

MS. MEYER: One follow-up question.

REDIRECT EXAMINATION BY MS. MEYER:

Q You were talking about the "aesthetically pleasing" on the video. Although it may not be aesthetically pleasing, is that type of heavy control talk an effective tactic to get suspects to stop in a pursuit?

A It can be.

MS. MEYER: I have no further questions.

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: No follow-up.

MR. KONRAD: Commissioners?

MS. MC KENZIE: I do. I found it interesting that -- A couple of things. The word "disturbing." You look at the video and you hear someone say, "I'm going to shoot you," that someone could see that as disturbing. Do you not find that disturbing?

THE WITNESS: I do, yes. Like I said, it is embarrassing and I do find it disturbing. In this case, though, I thought it proved to be effective because the person did stop running.

MS. MC KENZIE: I may have missed this. Aren't you disciplined for using this kind of language?

THE WITNESS: The threat, I didn't discipline. It's the profane language.

MS. MC KENZIE: No, just generally. Are you not disciplined as a police officer for using this kind of language?

THE WITNESS: It is -- you can be if

it persists, yes.

MS. MC KENZIE: What about the cursing? Are you saying the profanity?

THE WITNESS: Yes. If somebody used this -- I figured that this opportunity, a counseling session, use it as a training opportunity would benefit the situation more than writing up an investigation for using, profane language and handing out disciplinary actions for single incidents.

MS. MC KENZIE: I guess what I am trying to wrap my mind around is I fully understand you are wanting or you are, kind of, rallying to say this is someone that you, without a doubt, would have back on the force and a part of the team. I guess, the issue that I am having is, as a citizen, in this situation, it doesn't sound like "I am going to shoot you" is appropriate and so, I guess, what I am trying to wrap my mind around is knowing that, again, this is a person who has been spoken to about in the nature of what this hearing is, why is it that you feel so comfortable having someone like this on the force when it comes to citizens, knowing that he is saying, "I am going to shoot you," cursing at them and then -- I mean, do you understand where I am going with this? What is the comfort level that you have knowing that there may be

additional liability? Can you explain that to me?

THE WITNESS: I think I know where you are coming from. This wasn't a situation where Officer Zens gets sent to a shoplifting complaint and threatens to shoot any random citizen or a traffic stop and threatens to shoot somebody. This was a high stress situation where ending the foot pursuit as fast as possible was probably in everybody's best interests. It is a nighttime incident. This person showed a complete disregard -- the suspect did -- a complete disregard for the citizen safety on the roads as they were fleeing and driving in the wrong lane of traffic, showed a complete disregard for the safety of the passengers that were in his vehicle, especially when he crashed the vehicle and then fled the scene to avoid taking any responsibility for his actions. So in this case, this person that we are trying to -- Officer Zens is trying to apprehend, because he's proven already to be a danger to the citizens of Milwaukee, in this case, the high stress situation, I can -- maybe not an approval, but an understanding of why the language was used.

MS. MC KENZIE: I don't have any further questions. Thank you.

MR. KONRAD: Commissioner

Crouther? Cocroft?

MR. COCROFT: Sergeant, I just want to know the context as far as use of profanity in front of or after "I'm going to shoot you" and I understand the context of the actual incident. This doesn't lend to -- this Item 26, it doesn't lend to telling us the whole story. You, kind of, gave me a synopsis of the whole story, but the use of the term, you know, "mother-fucker," whether before or after, I guess he's all hyped up at the time and so I just want some context on how -- because you didn't put it together, so how did it happen? I didn't hear it on the body cam.

THE WITNESS: Sure. Would you like me to -- to explain the whole -- the entire incident? I can give you a brief synopsis of that.

MR. COCROFT: I just wanted to know if the two go together, the profanity and "I'm going to shoot."

THE WITNESS: I can't remember how the term "motherfucker" was used or "I'm going to shoot." I can't remember exactly. It is on the body camera, but those were the two terms that stuck out to me as being inappropriate and needing attention.

MR. COCROFT: I got you. So that is basically what you counseled him on.

THE WITNESS: Yes.

MR. COCROFT: So this is basically a judgment call on your discretion as far as whether somebody needs counseling or a reprimand?

THE WITNESS: Yes. If this were something that were to persist over time, then there would be a couple warnings and then after that, it would seem appropriate to take some type of further corrective action.

MR. COCROFT: This is his first time?

THE WITNESS: To my knowledge, yes.

MR. COCROFT: All right. Have you ever reprimanded any other officer for profane language the first time?

THE WITNESS: Not the first time. I provided counselings and used it as a training opportunity to draw attention that it is inappropriate.

MR. COCROFT: Okay. Thank you.

MR. KONRAD: In dealing with a young officer, less than a year and a half on the force, is there more tendency to counsel them as opposed to disciplining as opposed to dealing with a more veteran officer who might engage in the same conduct? I guess, you can only speak from your own experience.

THE WITNESS: We have an extremely young shift, so it is a lot of officers that are -- that have less than two, two and a half years on, so they are all still learning and it is important to keep them motivated and keep them learning and it's a training opportunity for many officers. If there is an officer who has plenty of time on, I am sure that in their experience, they have learned that using some profane language is already unacceptable and you don't really -- I don't see that out of a lot of experienced officers in my time. They have already learned.

MR. KONRAD: Thank you.

Do the lawyers have anymore questions?

MS. MEYER: I just have a brief follow-up.

RE-REDIRECT EXAMINATION BY MS. MEYER:

Q In this incident that we are here for today, Zens didn't say "I am going to shoot you," did he?

A No.

Q So the counseling that you gave him on July 23 was effective.

A Yes.

MS. MEYER: I have no further questions.

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: I have nothing.

MR. KONRAD: Thank you, Sergeant.

(Witness excused)

MS. MEYER: Next, we'd call Lieutenant William Wilson.

WILLIAM WILSON, having been first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth testified as follows:

MR. KONRAD: The witness is sworn.

DIRECT EXAMINATION BY MS. MEYER:

Q Please state your name, spelling the last for the record.

A William Wilson. W-i-l-s-o-n.

Q What is your occupation?

A Police officer.

Q How long have you been a police officer?

A I am on my 20th year now.

Q You are also a lieutenant. Correct?

A Correct, yes.

Q How long have you been a lieutenant?

A I have been a lieutenant for five years now.

Q Where are you currently assigned?

A District 7, late shift.

Q Do you know Officer Zens?

A I do know Officer Zens.

Q Have you ever been his direct supervisor?
A Yes.
Q For how long?
A I believe he came to us somewhere around August of 2018, so almost two years.
Q If you look through the stack of exhibits in front of you, I'd like you to find Exhibit 23, please. Do you recognize this document?
A Yes.
Q This is the "Evaluation Information Regarding Internal Matters." Correct?
A Correct.
Q And you were asked to fill this out. Correct?
A Correct.
Q What score did you give Officer Zens?
A For "Reputation," I gave him above average. For "Adherence to Core Values and Policies," average and for "Interest in Work," above average.
Q That is a pretty good score. Would you say so?
A Correct.
Q Is Officer Zens a good officer?
A Yes.
Q Is he an asset to the police department?
A He is.
Q Is he an asset to the City of Milwaukee?

A He is.
Q Would you welcome him back on your shift?
A Absolutely.
Q Would you feel comfortable supervising him again?
A Yes.
MS. MEYER: I have no further questions.
MR. KONRAD: Mr. Pederson?
MR. PEDERSON: No cross.
MR. KONRAD: Commissioners?
All right. Thank you, Lieutenant.
(Witness excused)
MS. MEYER: Next, we'd call Danilo Cardenas.
DANILO CARDENAS, having been first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth testified as follows:
MR. KONRAD: The witness is sworn.
DIRECT EXAMINATION BY MS. MEYER:
Q Please state your name, spelling your last for the record.
A Danilo Cardenas. D-a-n-i-l-o C-a-r-d-e-n-a-s.
Q What is your role with the MPA?
A I am a police liaison officer and the secretary/ treasurer.

Q Have you testified before?
A Yes.
Q In preparation for your testimony today, did you review Officer Zens' investigative reports, documents from Internal Affairs, personnel file as well as any records relevant kept by the MPA?
A Yes.
Q Did the chief provide any comparables in this case?
A No, he did not.
Q Do you know why not?
A I believe because there was no -- there was no investigations for similar conduct.
Q Through your experience and knowledge with the MPA, did you review -- did you do a review of discipline in order to find comparable discipline?
A I did.
Q We will start with 1.00, 1.05, referencing Wisconsin Law Enforcement Standards Board, Tactical Response Training Guide for Law Enforcement Officers, failure to stop and look for the suspect after losing sight of him during a foot pursuit. As part of your role with the MPA, do you have direct knowledge of discipline handed down through the years?
A I do.
Q Did you find any comparable discipline for this charge?

A I did not.
Q I just want to make this clear. You looked through all of the files in the MPA which -- for all of the disciplines kept on file and you found no other officer that was charged with this violation?
A That is correct. I think I went back to 2006.
Q Have you ever been involved in a foot pursuit?
A Yes, I have.
Q About how many?
A I would -- I worked 11 years at District 5, which is one of the more busier districts, both on the early power and the late shift, so -- I don't know. In any given year, probably tenish. Not as many as some officers, but definitely, not zero.
Q Have you ever lost sight of a suspect during a foot pursuit?
A Yes, I have.
Q Did you stop every time?
A No, I did not.
Q Have you ever been disciplined for that behavior?
A No, ma'am.
Q Given the lack of comparables and based on your experience and expertise derived from your time at the MPA, was the chief applying the discipline at hand fairly?

A I don't believe so.
Q Why?
A Because there was no comparable here. Obviously, there is incidents where officers don't stop, look and listen on a daily basis and anytime Internal Affairs working -- now, we have inspections, review body cam of use of forces or foot pursuits, I am sure that they see officers not stopping, looking and listening, but this particular incident was investigated.
Q Turning next to 1.00, 1.05 referencing SOP 460.10(A)(B) referencing Law Enforcement Standards Board, Defensive and Arrest Tactics Training Guide for Law Enforcement Officers, failure to meet deadly force requirement and target isolation. As part of your role with the MPA, do you have direct knowledge of the investigation and the discipline handed down throughout the years in regard to discharge?
A I do.
Q Did you find any comparable discipline?
A I did not.
Q Again, I just want to make clear. You said back to 2006, you found no other officers that's been charged with this violation.
A That is correct.
Q As part of your role with the MPA, do you have knowledge

of other officer-involved shootings?

A I do.

Q How or why? How?

A As both as a trustee and a police liaison officer, we are notified of all critical incidents to offer representation for the member involved and/or witness members. So we respond to every critical incident. I personally have responded to numerous since about 2015 and we also -- after that particular initial response, we keep a record of all critical incidents that we respond to in our database at the MPA office.

Q Did you look through that information that you kept in the MPA for today's case?

A I did.

Q Why?

A Because I was trying to find anything that would be comparable to target isolation, given that no one has ever been investigated, and I know we have responded to critical incidents where shots have been fired and there wasn't exactly target isolation and maybe somebody else was shot and hurt, I decided to do a review on those critical incidents.

Q Did you find any comparable conduct?

A I did.

Q Did you request the MPA staff to prepare a list of

comparable officer-involved shootings?
A I did.
Q And do you keep those records in the ordinary course of business?
A Yes, ma'am.
(A document was marked as Exhibit 27)
Q I hand you what's been marked as Exhibit 27. What is this?
A This is a table or spreadsheet that was created by the MPA regarding critical incidents. There is several listed; two incidents from 2018, one from 2017 and one from 2020. These are critical incidents that the Milwaukee Police Department Association responded to.
Q We will start first with Officer Brian Laroque. What happened in this incident?
A In this incident, officers got sent to a fight at a residence. Upon arrival, the homeowner released two pit bulls and as the pit bull charged at the officers, one officer, Officer Laroque, discharged his firearm while another officer was trying to Tase the pit bull. Officer Laroque, if you look at the circumstances, I believe did not have target isolation because he wound up shooting another officer in the hand at that particular incident. So not only did he miss the pit bull, but he hit the target beyond the pit bull.

Q So officer Laroque did not have target isolation.
A Not to my knowledge. It would appear not, considering that he shot a different subject.
Q Did Officer Laroque face any discipline for his lack of target isolation in this case?
A No, he did not.
Q Why is this conduct comparable to Officer Zens?
A Because it involves a critical incident, it involves discharge of a firearm and it also involves the lack of target isolation. It also -- Every critical incident is reviewed by the critical incident review team as well as Internal Affairs. Neither one of those, to the best of my knowledge, recommended an investigation be opened, did not feel an investigation was warranted and there was no SOP violations.
Q Next, we will turn to Officer Ethan Schlax. What happened in that incident?
A In that incident, officers responded to, I believe it was a trouble with subject call and a domestic violence enhancer, so when they arrived on scene, the subject was armed with a knife, he was, kind of, barricading, I believe. They tried to coach him out and the subject did eventually come out, but he charged at officers with a knife. Some officers tried to deploy a Taser. Officer Schlax determined he should use deadly force,

fired his firearm, struck the subject a couple times, I believe, but again, I believe he had lack of target isolation because he went beyond his target and shot another officer, Officer Malafa, in the foot.

Q So Officer Schlax didn't have target isolation, either?

A I would assume not, since he fired and struck a person beyond the target he was trying to hit.

Q Did Officer Schlax receive any discipline for his lack of target isolation?

A No.

Q Why is Officer Schlax' conduct similar to Officer Zens'?

A Once again, it was a discharge of a firearm. While he did strike the subject he intended to strike, he also struck another subject beyond his target. And again, it is reviewed by the Internal Affairs Division, as all critical incidents are, and the critical incident review team. No one found any policy violation and no investigation was ever opened.

Q Given your list of comparables the MPA created and the lack of any similar discipline and based on your expertise derived from your experience at the MPA, is the chief applying the discipline at hand fairly?

A I don't believe so.

Q Why?

A Because we have numerous incidents where officers have

failed to obtain target isolation. I believe that it is a fluid and rapid situation, so in all other incidents, no investigation was opened because they understand the complexity of the decision that is made in a split second and, therefore, the greater danger exception was probably allowed specifically with the subject that is running with a knife at officers. In this particular case, they threw that out the window and decided to make a statement, I guess, or an example of Officer Zens.

Q This list of four people, Exhibit 27, is that all of the list of officer-involved shootings that did not have target isolation?

A No. There are some other ones where vehicles were struck and/or garages or residences were struck. So this was just the ones that we thought would be more comparable to this incident.

Q Based on the substance of your testimony today as well as your experience and opinion as the -- as the MPA secretary/treasurer, long-time trustee, should Officer Zens receive any discipline for his conduct?

A In formal discipline, I would say no. Definitely not termination or being discharged from the department. Policy review perhaps, or maybe retraining at the department regarding target isolation and stuff like that, but I don't think it would warrant discharge from

the department.

Q Can officers always do better?

A Absolutely.

MS. MEYER: I have no further questions.

MR. KONRAD: We will take a break until 10:00 o'clock.

(Discussion off the record)

MR. KONRAD: We will proceed.

Ms. Meyer, do you have any additional questions?

MS. MEYER: I do not, not at this time.

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: Thank you.

CROSS-EXAMINATION BY MR. PEDERSON:

Q You testified that in your review of the incidents concerning Laroque and Schlax, that there was not target isolation. Is that right?

A I said I would assume there wasn't, given the fact that they struck objects beyond their intended target.

Q So you assume that there was not. What is that assumption based upon?

A The fact that he struck someone he wasn't aiming at.

Q So you didn't review any body worn camera?

A I don't have those records. The city didn't share it with us.
Q Well, you are aware that just because there is not target isolation, that is not the end of the analysis. Right?
A According to this incident, that is what the analysis was conducted, that --
Q What incident?
A The Zens incident.
Q I am not speaking about the Zens incident. I am speaking generally, when it comes to target isolation, when one is analyzing that issue, you don't stop just because there was not target isolation. Right?
A Yes.
Q What is the next step?
A Is there a greater danger exception?
Q And that is based on -- you have that knowledge based on your own training and experience. Right?
A Yes.
Q Are you aware whether or not the greater danger exception applied to the lack of target isolation that you assumed existed in these two cases?
A I would assume that in the Schlax incident, it definitely applied, considering the subject was armed with a knife and running at officers. As far as the

Laroque incident, I would have to do a little deeper digging into the reports of this incident.

MR. PEDERSON: That is all I have.

MS. MEYER: I have a follow-up.

MR. KONRAD: Go ahead.

REDIRECT EXAMINATION BY MS. MEYER:

Q You just testified about the greater danger exception that applied to Officer Schlax and Officer Laroque. Is that correct?

A Yes. I would assume that definitely applies in the Schlax incident.

Q In this case, though, in Officer Zens' case, there was no greater danger exception analysis done, was there?

A Not to my knowledge.

MR. PEDERSON: I am going to object. Lack of foundation.

MS. MEYER: He already testified that he reviewed all of the Internal Affairs documents, all of the files provided by the city and by the chief and he reviewed --

MR. KONRAD: What was the question again?

MS. MEYER: I said, there was no greater danger exception analysis done in this case, in Officer Zens' case.

MR. PEDERSON: I think it is also inconsistent with the testimony and all the evidence we have had.

MS. MEYER: If I may, a brief follow-up. If you look back at the Charges and Specifications, nowhere does it reference that greater danger exception analysis, that it was done at all in this case.

MR. KONRAD: I think the testimony of the police department expert, he did not address metering the corner at all. He did address target acquisition. So that is the state of the record, but ask your question.

BY MS. MEYER:

Q In the current case, in the case of Officer Zens, there was no greater danger exception analysis done by the chief, was there?

A Not to my knowledge.

MS. MEYER: I have no further questions.

RECROSS-EXAMINATION BY MR. PEDERSON:

Q What is that answer based upon?

MR. KONRAD: There is no answer. He doesn't know.

MR. PEDERSON: All right.

MR. KONRAD: Do the commissioners have any questions?

MS. MC KENZIE: I don't have any.

MR. KONRAD: Anymore questions?

MS. MEYER: Yes, I do.

RE-REDIRECT EXAMINATION BY MS. MEYER:

Q Mr. Cardenas, if you look through your stack of exhibits next to you, I think it is Exhibit 8 or 9. I could be wrong, but we are looking for the Charges and Specifications in this case.

A They are not up here. I've got 23 --

MS. MEYER: If you look next to you. Looks like probably 14.

THE WITNESS: No. 8?

MS. MEYER: 14. Sorry.

MR. PEDERSON: I don't understand what we are doing. I thought we rested on this witness. I had no follow-up.

MR. KONRAD: We are not playing strictly by those rules. According to the Fire and Police Commission statute, it says that the officer shall be given every opportunity to present their case.

THE WITNESS: I have it.

BY MS. MEYER:

Q Have you reviewed this document?

A I did, not quite -- I mean, not in the recent past, but I have looked at it not only when he was charged, but when we decided to further his appeal.

Q In this document, is there any reference to the greater danger exception?

THE WITNESS: One second to review it fully and I will give you a definite answer.

MR. KONRAD: I think the document speaks for itself. It quotes the target isolation section, but it doesn't quote the additional language in the training. She said additional language about the greater danger exception.

A I don't find anything in here that mentions greater danger. It talks about if the subject that shoots in an apartment building, runs out of the apartment building and runs into a crowd, do not shoot at him without endangering others. It doesn't say if that subject -- if there is a greater danger that he is going to continue shooting at people in the crowd, it may be warranted to take a shot a like that or something like that. It doesn't say anything about that. It just says that you would not be allowed to endanger others. So I don't think the greater danger exception is mentioned in this article.

Q This document, the Charges and Specifications,

Exhibit 14, is what Officer Zens' discharge is based on. Correct?

A Correct.

MS. MEYER: I have no further questions.

RE-RECROSS-EXAMINATION BY MR. PEDERSON:

Q In your knowledge and experience, are Charges and Specifications intended to be an exhaustive review of the entire contents of an investigation?

A I believe it is a summary of what is, but when the discipline is decided, I do believe they put down -- Normally, every Charges and Specifications I have seen, usually, the last paragraph was articulated exactly why they were discharged or what the discipline -- why they were disciplined.

Q Do you acknowledge that there can be essential facts, rules and other information that are relevant to a hearing that are not necessarily going to be contained in a Charges and Specifications?

A It would be within the cover sheet or the investigative notes, normally.

Q Well, all essential facts, generally, are going to be found in the entirety of the investigative file. Is that right?

A Yes.

Q Not the entire investigative file is necessarily going to be found in the Charges and Specifications, is it?
A No. Then the document would be many pages long. I don't think every single thing that is investigated or everything that is revealed in the investigation is included in the Charges and Specifications sheet.

MR. PEDERSON: Thank you. That is all I have.

MS. MEYER: I have nothing further.

MR. KONRAD: Commissioners?

MS. MC KENZIE: I have nothing.

MR. KONRAD: Hearing nothing, thank you.

(Witness excused)

MS. MEYER: Next, we'd like to call Officer Zens.

NIKOLAS ZENS, having been first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth testified as follows:

DIRECT EXAMINATION BY MS. MEYER:

Q Please state your name, spelling the last for the record.
A First name is Nikolas. N-i-k-o-l-a-s. Last name is Zens. Z-e-n-s.

Q Do you feel you should be terminated for your actions?
A I do not, no.
Q Looking at Exhibit 26, that should be in front of you. Do you remember the incident that led to this memo?
A Yes, I do.
Q And specifically in Paragraph 2, it talks about some language that you used.
A Yes, it does.
Q Do you remember the context in which you said that language?
A Yes, I do. Just a brief overview, it was a lengthy vehicle chase, a very dangerous one.

MR. KONRAD: Would you speak up a little?

THE WITNESS: Sorry.

A It was a vehicle chase, a lengthy one, and a dangerous one, as my sergeant had previously testified. He was going in the wrong lane of traffic at a high speed, and he actually wound up crashing his car with, I believe it was three or four occupants. He ran. I lost sight of him around the corner. I stopped, I looked, I listened. That is on the body cam. I heard a fence jingle and under my breath, maybe a little louder, I did say "motherfucker" because I heard him to the left of me and I started my pursuit of him again. A few moments

later, I did say I was going to shoot him and he stopped immediately in the back yard and I decentralized him and put him in the cuffs and that was it.

MS. MEYER: Now please locate Exhibit 23.

THE WITNESS: I have it.

Q Do you recognize the documents contained in this exhibit?

A I do.

Q What are they?

A It is my evaluation from three supervisors at District 7, late shift.

Q If you turn the page to the next one, what evaluation is that?

A This is my annual evaluation, I believe.

Q For what year?

A This would have been 2019.

Q That is the year that this incident happened. Correct?

A That is correct.

Q And what month was this evaluation done?

A Looks like December.

Q That was after this incident happened as well. Is that correct?

A That is correct.

Q Turning to the page marked 24, which is also the last

page, what was your evaluation average for this year?
A 3.30.
Q Were there any comments written?
A There was. Would you like me to read them?
Q Yes.
A It says -- A little bit is cut off on the left-hand side. I will do my best. It says,

"P.O. Zens is loaded with enthusiasm and approaches his duties with a positive demeanor. P.O. Zens is respectful to his supervisors and takes action on feedback provided to him. P.O. Zens is showing positive development as a police officer and is currently assigned to a proactive squad that will allow him gain experience and exposure to the type of criminal activity that piques his interest."

Q Were there any goals on your review?
A There was. I can read those as well.
Q Yes.
A It says,

"P.O. Zens has indicated that he would like to maintain an assignment to a proactive squad, and apply for the Tactical Reinforcement Enforcement unit when eligible. P.O. Zens also maintains interest in other specialty units such as HIDTA, SID, AND SAU.

Q Was there any mention of the incident that we are here

for today on this review?

A I don't believe so, no.

(A document was marked as Exhibit 28)

Q I have handed you what's been marked as Exhibit 28. What is this?

A This is a Certificate of Commendation I received while I was in the Marine Corps in 2014.

Q What did you receive this for?

A Just a brief overview, I was -- it was a weekend and I was in San Diego, about an hour south of where I was stationed and my friend and I were leaving a restaurant and we saw a female fall and hit her head on the curb very violently. A circle gathered -- a circle of people gathered around her, just staring at her. My friend and I realized we had to do something. Her eyes were rolled back, she was convulsing, foam coming out of her mouth. It was pretty bad. We stepped in, we used our life-savings skills we learned in the Marine Corps. We stabilized her, we waited till the EMS arrived. I actually helped the EMS put an IV in her, since he was a little new, and I followed up later and I found out she survived and had a favorable recovery. I received a commendation for stepping in done and doing that.

(A document was marked as Exhibit 29)

Q I've also handed you what's been marked as Exhibit 29.

What does this packet consist of?

A The first two are from my supervisors in the police department. They are a letter of recommendation that were written after I was discharged and then I also have two from my supervisors in the Marine Corps that were written after I was discharged from the Marine Corps. Also, letters of recommendation.

MS. MEYER: Please locate Exhibit 22 in your packet.

THE WITNESS: I have it.

Q These are your Response to Charges. Is that correct?

A Yes.

Q Do you still stand behind your statement?

A 100 percent fully I do, yes.

Q Do you enjoy working as a police officer?

A It is my greatest life accomplishment. Yes.

Q Do you enjoy working in the City of Milwaukee?

A I adopted this city when I moved here. I am not from here originally. The city has been nothing but great to me and it is an honor to serve it.

Q Have you learned anything from this incident?

A I have. I learned that training, obviously, our greatest tool and it should be used appropriately. There are so many things that we could look over and say I should have done better on this, absolutely, but I

just want what is best for the City of Milwaukee and the department.

Q Is there anything else you'd like the commissioners to know before they deliberate?

A I wrote up a letter that I would like to read to them.

MS. MEYER: With the hearing examiner's permission, I ask that he read the letter into the record.

MR. KONRAD: That is fine. Go ahead.

A It says,

"Before I begin, I would like to take a second to thank the panel for allowing me to speak. It's appreciated. I'd also like to apologize to Mr. Davis and the family of Mr. Davis. I'm sure this has been incredibly hard for them and I hope they are doing okay.

I adopted this city in 2017 when I moved here to become a police officer. I had just finished a police academy in Florida and a short time later, I applied to the Milwaukee Police Department.

Most of my family lives here or in the area, so it was an easy choice for me. My grandfather and my two cousins were Milwaukee police officers and detectives. I cannot think of a higher honor than following in their footsteps.

I am internally grateful for my opportunity to serve the great City of Milwaukee and the community. There is so much potential and prosperity here. I truly believe that making a difference in which the community I serve.

I cannot think of doing anything else in my life other than being a police officer. On the back of one of my baseball cards when I played and was eight years old, I put, "I want to be a policeman when I grow up." I still have that card as a reminder in case things got tough at work.

I know I was put on this earth to serve my country, community and, most importantly, help. I love helping people. For instance, one night on a weekend from the Marine Corps I was in San Diego and helped a woman" --

which I just explained.

"I was an awarded a commendation for this. I only thought of it as my duty as an American to help my fellow American. Fast forward to being a police officer here. I cannot think of one night I went to work and left without being fulfilled, knowing I helped someone that night. The community calls on us in their worst moments and we are there to help in any possible way. This is truly something I will never take for

granted. I am a simple man. I eat the same things day in and day out. I am an active person in the German Shepherd rescue community. I walk my German Shepherd four times a day. We do daily training and I go to the gym. That is it. I rarely drink and when I do, it is probably a glass of wine with my meal. I don't get into trouble. I live a content life with just one piece missing, being a police officer. I cannot express enough my apologies to Mr. Davis. I hope he can forgive me. The city deserves the best officers and ones that genuinely want to help. Please let me help again be an officer in Milwaukee and specifically, the community. It is one of, if not my greatest achievements. Thank you again for letting me speak.

(A baseball card was marked as Exhibit 30)

Q I'm handing you what's been marked as Exhibit 30. Is this the baseball card you just referenced?

A Yes, I have it right here.

MS. MEYER: I have no further questions at this time.

MR. KONRAD: Mr. Pederson?

MR. PEDERSON: Thank you.

CROSS-EXAMINATION BY MR. PEDERSON:

Q So I am going to reference the July, 2019, incident first. You acknowledge that you did make the statement

"I'm going to shoot you." Is that right?

A Yes, I did.

Q All right. Do you recall how many times you said that?

A I don't. My best guess would be one to three times. More likely, once or twice.

Q Okay. So you'd agree with me that the -- the memo itself here indicates that the body worn camera indicated that you had stated it multiple times. Right?

A Right. Yes.

Q All right. No reason to believe that is inaccurate.

A Right.

MR. PEDERSON: All right. I just wanted to clarify the record on that point.

Q So I really only have one other question for you. You'd agree with me that this is legitimately a concern, not only for the incident here, not only for the FPC and the department, but the citizens of Milwaukee as well. Right?

A Of course.

Q Okay. So I am wondering, if a citizen of this city came to you and said, "you know, I am really concerned about this incident. You know, what happened, happened. You did accidentally shoot an innocent bystander. Why should I have confidence in you in the future?" How would you respond to that person?

A I would first say that I was a young officer and I think young officers make mistakes. That is not saying, you know, what I did was wholeheartedly correct. I would say I took the necessary training steps to ensure this does not happen again. While there is no guarantees in life, I would do my absolute best. I only put a hundred percent of my effort every day into work and I would do the same into retraining, if that is what the department deems necessary, and I would just ask for forgiveness and that I would promise them that I am doing my best to ensure that they are safe.

MR. PEDERSON: Thank you. I have nothing further.

MS. MEYER: I have nothing further.

MR. KONRAD: Commissioners?

MS. MC KENZIE: Officer Zens, what would you now say to yourself on that night, knowing everything that --

THE WITNESS: I'm sorry. The last part?

MS. MC KENZIE: What would you say to yourself now, sitting here, to you back then that night? What would you say to yourself?

THE WITNESS: I would probably tell

you to meter the corner, to be honest. I am not saying that directly led to this, but we can sit here and pick it apart all we want and going back at that time, that that probably played a large part.

MS. MC KENZIE: I don't have anything further.

MR. KONRAD: Commissioners Crouther or Cocroft?

MR. CROUTHER: Yes. Officer -- Commissioner McKenzie, I don't know if I'll ask the same question, but, in retrospect, looking at the situation, going through this hearing and all that's under consideration that's been said, your experience of the incident, what would you do differently if it -- if you had a chance to?

THE WITNESS: Firstly, I think it all goes back to that metering. I probably would have created the distance and maybe that would have allowed me to give -- be given an extra second of time to evaluate everything. This was such a quick incident, it is -- it's hard to think of what I could have done differently, but I think the metering and just -- just absolutely sticking to my training. I think that is what I would have done differently. Maybe took a second and breathed and went from there.

MR. CROUTHER: How would you define a violent situation from a non-violent situation of similar circumstances? We've gone through a whole lot of material. We talked about non-violent offenses, we talked about violent offenses. And so how -- how do you -- Aside from -- with your training, how would you define really -- or would you consider it a violent situation that you were facing?

THE WITNESS: I think I caught most of that.

MR. KONRAD: I think the question is directed to how would you evaluate the situation in the context of why the chase occurred in the first place which goes to the issue of you were secondary to the chase, so what was your understanding of why you were chasing? We know that this -- the original chase was a traffic violation, but you were secondary. You were looped in in the middle of the thing. So his question is, how do you evaluate the situation in light of your knowledge of the reason for the chase?

THE WITNESS: We were monitoring the radio throughout the majority of the 19 minutes of that chase. And normally, officers stay on the radio every time they go through a red light and their speeds, so I heard how fast he was going through these red lights.

I also heard he was evading the stop sticks we had in place to try to slow him down and stop him. He was taking those evasive maneuvers at a high speed. That is very dangerous to get around those. I heard that. Then as soon as we popped into the secondary, the crash and then backed up quickly into the squad. If you are willing to damage a police car or any car or anything for that matter in order to get away for a simple traffic offense -- and that's all we knew at the time -- then, in my head, it immediately sparks, what is in the car? Is he wanted for something? If someone is willing to do all of that just to get away, then, to my interpretation, he's probably a violent person or he is wanted and then to continue to flee on foot after verbal commands to stop, completely disregard that and then him running to the house and potentially putting his family in jeopardy or whomever that was, that is a violent person, in my opinion, and again, I am sorry for the family of Mr. Davis.

MR. KONRAD: Commissioner Crouther, did you hear the answer?

MR. CROUTHER: I heard it. I am somewhat satisfied. I will allow Mr. Cocroft.

MR. KONRAD: Commissioner Cocroft, any questions?

MR. COCROFT: No questions.

MR. KONRAD: Commissioner McKenzie?

MS. MC KENZIE: I don't have any questions.

MR. KONRAD: Do the lawyers have any questions?

MR. PEDERSON: None.

MS. MEYER: No follow-up.

MR. KONRAD: Thank you.

(Witness excused)

MR. KONRAD: Anymore witnesses?

MS. MEYER: No. We would rest at this time, asking that all exhibits marked be moved into evidence.

MR. PEDERSON: No objection.

MR. KONRAD: They will be received. That finishes the presentation for Phase 2 except for the closing statements. Would either of the attorneys like to make a closing statement?

MR. PEDERSON: I don't feel it is essential. I will if counsel wishes to.

MR. KONRAD: I am not a big fan of it at this stage, but it is a discharge, so I will give you the option.

MS. MEYER: I think Attorney Matthews would like to make a closing statement.

MR. KONRAD: Mr. Pederson, are you going to waive yours or are you going to make one?

MR. PEDERSON: I will waive it. I think the evidence spoke for itself and I will allow Mr. Matthews the opportunity here to speak on his own.

MR. KONRAD: Of course, we are only addressing what, if any, discipline should be imposed -- or the degree of discipline in this case.

MR. MATTHEWS: I will try and be as brief as possible. On Phase 2, we are looking at whether the chief is applying the rule or order fairly and without discrimination against the subordinate. We have just seen, even through the testimony today, that the rule or order -- first of all, we don't really know what the rule or order is because it is not specified in the charges specifically -- that it's not being applied without discrimination to the subordinate.

Everybody has been in foot chases in the Milwaukee Police Department that's ever worked the street. I believe everybody has also testified that they have lost sight of suspects during foot chases and yet, here we are today. I don't know how old the police department is, but it is over a hundred years old. The

only person who has ever been disciplined for that charge is Officer Zens, and he got 20 days. That is not fair. That is not applying the rule or order fairly and without discrimination.

Then you have to look at the other charge; target isolation. I think the comparables speak for themselves. A lot of people in the Milwaukee Police Department have discharged their firearm. They have not hit the intended target at all times. Nobody else has ever even been investigated for that. So we have one officer who was fired for not having target isolation and then we have, I don't even know how many, but many other officers who have hit other people, hit innocent people, hit dogs, hit other officers who haven't even been investigated for the same type of conduct.

Attorney Pederson asked some questions about, "well, doesn't the greater danger exception apply?" Okay. Sure. That probably is true. It should be analyzed, but in this case, it was not analyzed. And that goes back to the issue with the actual charges themselves.

The discipline has to be based on how the charges are written. You don't have to put everything in there, but you have to put in the reasons for the discharge. If the reasons for the discharge were you

don't have target isolation and you don't have -- the greater danger exception doesn't apply, then you have to say that. The chief didn't say that. He just said, "you didn't have target isolation; you're fired." That is not applying the rule or order fairly or without discrimination.

Then you look at the record of service. Officer Zens, everybody has testified as to how good of an officer he is. Again, you don't get on the captain's car with a year and a half experience unless you are a very good officer. You don't have a lieutenant come here and a sergeant and your partner come in here and say, "this guy is a good officer. He is an asset to the department. We want him back. We want him to work under our command." Again, if there were any concerns, it would be really easy for those people to say, "no, I don't want him back" or "no, I don't want him to work here." So those people are willing to, by extension, take him up, take his alleged bad conduct right up and say, "yes, this is the guy I want to work for me." Think about that. Look at his career record. At the police car. He's always wanted this job.

Now, he was asked some questions about what he would change and I don't think those were really fair questions because the whole point of this case is that

you are not supposed to look at it with 20/20 hindsight. You are supposed to look at whether his perceptions at the time were reasonable. Every single person has determined that they were. The overall use of force was determined to be reasonable. Again, the district attorney, every single person that looked at this, the department's own expert. Mr. Willis, the guy who literally wrote the book. Yet, here we are saying, "look, this guy -- some piece of the use of force actually wasn't justified." Again, this doesn't make any sense. It doesn't go to his record of service.

Those questions asked him yes, maybe if he would have metered, maybe Mr. Brown wouldn't have turned around in the way that he did and maybe Officer Zens wouldn't have fired. But that doesn't change what happened. There is no guarantee that what happened wouldn't have happened, regardless of how the situation was approached. I think the answer Officer Zens would have given, if asked, is, if presented with the same facts from Officer Brown (sic) and the same observations, would he do the same thing? I think the answer is yes. And there is nobody here qualified to say otherwise. There is nobody that testified they are qualified to say otherwise. The only person who said otherwise was Inspector Formolo, and I think you guys

know how I feel about his candor and testimony.

So again, we look at the discipline, whether it reasonably relates to the seriousness of the alleged violation. The alleged violation is not having target isolation. We have already shown that you don't have to have that. Then you look at his record of service. His record is outstanding. Look at the counseling. The counseling worked. That didn't become an issue. In this incident, Officer Zens didn't say, "I am going to shoot you, stop," or words to that effect. He never said that, so he stopped using that language.

Again, I would ask this Commission -- I respect your opinion on -- or your decision on Phase 1 because I have to, but I know that Officer Zens should be a police officer for the Milwaukee Police Department, he deserves to come back, so I ask that you give him that opportunity. He is an excellent officer. Thank you so much.

MR. KONRAD: Thank you, Mr. Matthews. Thank you, attorneys, for presenting the case as well as they have. We will now deliberate in closed session in order to determine whether the good of the service requires the officer be disciplined pursuant to MPD Personnel Order 2020-76 dated July 30, 2020. We are going to deliberate for the reasons under the

statutory authority noted in the notice for the meeting.

Is there a motion to go into closed session?

MS. MC KENZIE: So move.

MR. KONRAD: Is there a second?

MR. COCROFT: Second.

MR. KONRAD: There is a motion and second. Any objections? Hearing no objections, closed session.

(Closed session 10:39 - 10:57)

MR. KONRAD: We are back in session at approximately two minutes to 11:00. The members of the panel have decided unanimously that the discipline of Nikolas Zens should be sustained for the good of the service as to the Count 2 -- excuse me, as to Count 1 and to be suspended for a total of 20 working days from the Milwaukee Police Department pursuant to the terms of the MPD Order 2020-76.

As to Count 2, the members of the panel have unanimously decided that the discipline of Nikolas Zens should be sustained and that, for the good of the service, it requires Nikolas Zens be discharged from the Milwaukee Police Department pursuant to the terms of Personnel Order 2020-76.

We will provide a written decision as soon as

practicable, and are waiving the ten-day Fire and Police Commission Rule 16 10(f).

We stand adjourned at 11:00 a.m. Thank you.

(WHEREUPON, PROCEEDINGS WERE CONCLUDED AT 11:00 A.M.)

STATE OF WISCONSIN)
)
COUNTY OF MILWAUKEE)

I, SUSAN K. TAYLOR, do hereby certify that I am a stenographic reporter; that I was present at the proceedings in the above entitled action, and that I recorded the same in shorthand; that the above and foregoing is a true, correct and exact copy, in longhand, of my shorthand notes taken of said proceedings.

Dated this 27th day of January, 2021

SUSAN K. TAYLOR
Court Reporter

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