

**CITY OF MADISON
Intra-Departmental
CORRESPONDENCE**

DATE: **January 1, 2013**

TO: **Noble Wray, Chief of Police**

FROM: **Dan Olivas, Lieutenant of Police**

SUBJECT: **Administrative Review, 2012-PSIA-0054**

Initial Information:

On November 9, 2012 at approximately 3:00am I was contacted telephonically by the night shift Officer in Charge, Sergeant David Compton. I was advised that there had been an Officer-Involved shooting which involved Officer Stephen Heimsness and it had occurred on the street in the 500 block of South Baldwin Street. I responded in my capacity as the Professional Standards & Internal Affairs Lieutenant. I arrived at the scene at approximately 3:45am but did not enter the inner perimeter at that time. I noted an apparent body was covered with a cloth in a driveway area, and the scene appeared to be secured at that time.

After viewing the scene from outside the inner perimeter, I responded to the investigative command post which Captain Gloede had established in the incident command room at the central police station. Lieutenant Kosovac responded to coordinate the criminal investigation.

Investigation:

At approximately 4:15 a.m. I entered the men's locker room at the central station and happened to encounter Officer Heimsness as he was walking to his locker. Officer Heimsness was already in his civilian clothes at that time. We spoke briefly and I asked how he was doing. Heimsness responded that he was ok. I observed that Heimsness's eyes and speech were clear, and observed nothing unusual about his physical state.

I monitored the criminal investigation as it was ongoing over following day, and was briefed regularly as it continued.

I was also present in the morning hours of November 9 for a discussion with Chief Wray as to the possibility of bringing in an outside observer to "shadow" the criminal investigation. It was determined that Chief Wray would request an observer from the Dane County Sheriff's Office. Lieutenant Schuetz of the DCSO responded and monitored the investigation as it continued over the next several days. Lt Schuetz and I were present at the scene when PO Troumbly conducted her walk-through on November 9.

State of Wisconsin Department of Justice:

In the days following the shooting, there were discussions with Chief Wray regarding an independent review of Officer Heimsness use of deadly force in this circumstance. Asst Chief Davenport made contact with Tony Barthuly, the Director of the State of Wisconsin Department of Justice Training and Standards Bureau, who assigned staff from his office to review the case. On November 29, 2012 I met with Stephanie Pederson and Glenn Reberg of the Training and Standards Bureau. I provided a verbal briefing of the criminal investigation to that point, and my interviews of Officers Troumbly and Heimsness, as well as digital copies of the criminal case file as it stood on that date. I again met with the Training and Standards Bureau staff on December 5, 2012 and provided a brief update as to my investigation. As I have received transcripts of my interviews with the involved officers, I have forwarded them to Ms Pederson. On 12/27/2012 I forwarded the additional information received regarding the firearms report completed by William Newhouse of the Wisconsin State Crime Lab.

Factual Summary:

What follows is a factual summary of the circumstances of this case. I have noted information that is consistent across multiple witness statements, as well as information that is associated with evidence such as 911 Center recordings, and physical evidence recovered by investigators. Within the content of the below information, I am including direct references to page numbers within the reports from the criminal investigation, as well as pages from the transcripts of the interviews I conducted with the parties involved. The investigative reports from the criminal investigation (MPD Case # 2012-320242) have been compiled into a single pdf document within which individual reports have been assigned numbers (report #1, report #2, etc) and within which all pages have been sequentially numbered. I will refer to this single large pdf file as the "Master Report File" or the "MRF".

On November 9, 2012, at approximately 2:44am, a resident at 513 S Baldwin St, Megan O'Malley, was awake, nursing her child on the second floor of her residence. At that time she heard the sounds of someone opening her front door and entering the residence. Megan could hear the family dog barking, and woke her husband, Kevin O'Malley, to have him investigate (2012-320242 Master Report file, p. 151). Kevin sent the family dog downstairs, saying, "Jake, go get em". Kevin went to the first floor and after a short time, Megan could hear Kevin speaking with someone about having to get out, and about the keys to the residence. Megan called down to Kevin and asked if he needed her to call 911, and he stated no. Megan found Kevin's response somewhat unusual, as he simply stated, "no" and nothing further. Megan's statement to Detective Esser continues (MRF page 152):

Megan stated that she remembered thinking to herself, what if the person who had come into her home had a gun pointed at her husband and he (the unknown person in their home) was telling Kevin to say "no" to her question about calling 911. Megan stated that she was afraid at this time and that the whole situation seemed very strange to her and that her job was to protect her children and her family. Megan stated that she then called 911.

What follows is a transcription of Megan's initial call to the 911 center, which begins at 2:45a.m. (MRF page 7):

**TRANSCRIPTION OF 911 CALL:
911 911, what's the address of the emergency?**

Female 513 South Baldwin.
911 Is that a house or an apartment?
Female House.
911 Can you repeat the address to me so I have it right?
Female 5-1-3 south Baldwin.
911 And that's the City of Madison?
Female Yes.
911 And what's the phone number you're calling from?
Female Um, [REDACTED]
911 And what's your name?
Female Megan O'Malley.
911 Tell me exactly what happened?
Female Um, I just, I left the key in the door from walking the dog, and we just heard barking and then we just heard someone enter my house, and my husband just went downstairs.
911 Somebody went into your house?
Female Someone was coming into the house, and my husband just went downstairs, and I'm upstairs with the kids and our dog went down there and (unintelligible) barking now.
911 Okay, so somebody's inside your house, your sayin?
Female Yes.
911 Okay. So they're on the main level, your husband's in the basement and you're on the second floor?
Female They're on the main level, and I'm upstairs, yes.
911 OK. And your husband is down in the basement? Or he went down to go
Female He, he went down to the door, and I just said is everything okay and he said yes, but I have no idea what's going on.
911 OK. Are there any weapons involved or mentioned?
Female I have no idea. Not with us, no.
911 OK, are you in immediate danger?
Female I don't know.
911 K, just tell me if you feel unsafe at any time. Is anyone else in immediate danger?
Female Um, yeah, I mean, I'm gonna say yes, I don't know, I'm upstairs with the kids you know.
911 OK, exactly where are they now, the people that are in danger?
Female Um, we're all upstairs in the bedroom.
911 You're all upstairs in the bedroom except for your husband?
Female Yes.
911 And where is he?
Female He went downstairs.
911 OK, is anyone injured?
Female No.
911 OK, do you have any descriptions of the person that entered your house?
Female No. No.
911 And where did he enter the building?
Female The front door.
911 Where are the possible exits from the building?
Female Um, the back door.
911 Just the front and back door?
Female Mm hmm.

911 Is there anyone else in the building that belongs there? You said your husband and your kids?

Female Um, just my husband and my kids.

911 How many kids?

Female Four.

911 OK. Just stay on the line with me. So your husband went down to check, to see what's...

Female Yes.

911 Happening basically?

Female Yes.

911 And you haven't heard anything from him?

Female Correct. Well I said do you want me to call 911 and he said no, it's okay, but I have no idea what's going on, you know.

911 Sure.

Female I also want everything to be fairly calm when somebody comes. It's okay Dustin, it's going to be okay. I understand, you too. Yes, I am on the phone. It's going to be okay. You're okay.

911 OK. You haven't heard anything else from your husband?

Female No.

911 OK

Female (unintelligible)...come over here...(unintelligible) can you shut the door please? Everything's fine. OK, I'm on the phone with 911. They won't (unintelligible) to our house. We don't know.

911 There should be officers pulling up right now.

Female OK.

911 Stay on the line with me. They're going to check outside.

Female I would like to know when they check in with my husband out front (unintelligible)

911 OK Can I tell them what your husband is wearing, so they don't confuse him for...

Female Gray t-shirt

911 What's that?

Female Gray t-shirt and plaid pajama bottoms. He has light brown hair. No glasses or anything. Thirty eight year old male. White.

911 OK

Female It's okay. Everything's going to be okay. Everything's going to be okay.
(Three shots fired)

Detective Jokala of the Madison Police Department was able to ascertain that it was possible to go to the 911 Center and listen to the audio regarding this call for service in real time-the 911 call and police radio traffic were synced (Master File page 294). Jokala listened to the audio, noting times for her report.

Jokala notes the call is dispatched via police radio at 2:47:09 a.m. 3 Gunshots are audible on the 911 call recording at 2:49:54 a.m., a time lapse of 2 minutes and 45 seconds.

What follows is the radio traffic from this call for service being dispatched, as well as the associated times noted by Detective Jokala. (MRF page 296):

Dispatch Tape:

Dispatch: "5 David 7" (2:47:09 am)

Dispatch: "David 7"
Dispatch: "4 David 11"
4D11: "David 11"
Dispatch: "David 7, David 11, possible B&E in progress. 513 South Baldwin. South of Spaight. Caller can hear someone in the house."
D7: "7 copy."
Dispatch: "David 1, I'll have you start that way also."
D1: "10-4" (31 sec)
5D8: "David 8, This is unfounded. I'm en route"
Dispatch: "Copy, David 8 en route also."
D14: "David 14, I'm on Patterson and East Wash, I can go for one of the other units."
Dispatch: "Copy that. 5 David 1, you can disregard for now." (2:47:46 am)
D1: "David 1, I'll go for 11."
Dispatch: "You're gonna for for 11 instead?"
D1: Inaudible
Disptach: "Copy. David 11 10-8."
D11: "10-4"
C2: "Charlie 2 in the area."
Dispatch: "Charlie 2 in the area."
5D8: "David 8 23" (2:48:43 am)
Dispatch: "Copy David 8, caller heard someone come in the front door, husband went down to see what was going on, she's still upstairs with four kids."
Dispatcher: "5 David 8?"
5D8: "David 8." (2:49:28 am)
Dispatcher: "Husband's wearing a grey t-shirt and plaid pajama bottoms." (2:49:33 am)
5D8: "-side there's a fight." (2:49:39 am)
D14: "David 14 out" (2:49:45 am)*
Dispatcher: "David 14 out."
(Shots fired at 2:49:54 am – audible on 911 call recording)
5D8: "D8, shots fired, suspect down, we are 10-2" (2:49:58 am)*
Dispatcher: "Copy 5D8, shots fired, suspect down, emergency traffic on channel 1 yet."

Jokala goes on to give the following summary (MRF Page 297):

SUMMARY

2:48:43 – 5D8: *"David 8 23"* **Dispatch:** *"Copy David 8, caller heard someone come in the front door, husband went down to see what was going on, she's still upstairs with four kids."*

45 seconds elapse

2:49:28 – 5D8: *"David 8"* (responding to prompt from Dispatch) **Dispatch:** *"Husband's wearing a grey t-shirt and plaid pajama bottoms."*

11 seconds elapse

2:49:39 – 5D8: *"-side there's a fight"*

6 seconds elapse

2:49:45 – (Troumbly) D14: *"David 14 out."*

9 seconds elapse

2:49:54 – Three shots fired, audible on tape.

2:49:58 – 5D8: *"David 8, shots fired, suspect down, we are 10-2."*

In short, from the time Officer Heimsness makes the radio transmission regarding a fight, to the audible shots on the 911 call recording, fifteen seconds pass.

In the course of the criminal investigation, statements were taken from the O'Malley family, in particular Kevin O'Malley, who was present when the shots were fired. Statements were also taken from Officer Heimsness and Officer Troumbly. I have conducted separate interviews with Officer Heimsness and Officer Troumbly.

The vast majority of information obtained from Officers Heimsness and Troumbly, as well as from Kevin O'Malley is very consistent. Officer Heimsness responded to the call of a burglary in progress with someone heard in the house from his location at a prior call for service, a noise complaint at 606 S Brearly St.(MRF page 155), a distance of 3 blocks. Google maps shows this distance to be 0.4 miles and taking an estimated 2 minutes to drive. Officer Heimsness' statement is that he was close, and he did not activate his emergency lights on the way to this call. Heimsness parked his marked police squad facing North on the west side of Baldwin st, just south of Spaight St(MRF page 355) and exited, walking at a North-easterly angle. Heimsness was looking and listening, but stated he heard nothing. Heimsness transmitted he was on-scene and was advised that the caller's husband had gone "down" to investigate. While walking, Heimsness observed a marked squad coming South on Baldwin St from Williamson St, and observed it to extinguish it's headlights and pull to the western curb. Heimsness briefly "blipped" his flashlight at this other squad a couple times as he crossed the street, to show his location to the officer and give them an idea where the target resident was. Heimsness stated he stopped near a tree to the south of 513 S Baldwin St to continue to listen but could not hear or see anything. Heimsness, who wears a radio earpiece, was given a clothing description of Kevin O'Malley by the 911 center.

Officer Heimsness stepped out onto the sidewalk area to better see what, if anything, was going on. At that point Heimsness observed a male he believed, based on the description, to be the homeowner. The homeowner was involved in a physical struggle with another party on the sidewalk area. From Officer Heimsness first interview with Detectives (MRF page 157):

At this Point Detective Riesterer asked PO Heimsness if he could stand up and show her how the two, homeowner and suspect, were grappling or wrestling. I observed that PO Heimsness demonstrated by using Detective Riesterer as the suspect. They were standing within inches of each other. Both of them had their arms up on the shoulders of the other and were grabbing clothing with their hands. PO Heimsness described that they, the suspect and homeowner, were wrestling around and moving around while holding onto each other's shoulders with their hands.

PO Heimsness said that from what he saw, the suspect and the homeowner grabbed each other using both hands to the clothes, to the shoulders of each other and they were twisting and turning. He could see the homeowner based on Dispatch's description and he thought ok, the other guy is the burglar and they are in some sort of fight. PO Heimsness knows that this suspect is a burglar, he does not know if he has any weapons.

Officer Heimsness description of this struggle is very consistent with Kevin O'Malley's description (MRF Esser initial interview with Kevin O'Malley page 133):

I asked Kevin to describe exactly how it was that Paul came at him. Kevin stated that he immediately felt threatened because Paul physically came at him and grabbed onto his arms in an aggressive manner. Kevin stated that he grabbed the collar of Paul's coat. Kevin

stated that Paul was pushing him backwards, and that he had to hold onto Paul's collar to hold Paul off. Kevin stated that Paul was pushing him, and he remembered thinking that things had now turned ugly and that he was now going to have to yell for help. Kevin stated that he also recalled thinking, "How am I gonna get out of this situation?"

Kevin stated that as he was thinking this, he heard somebody come up from behind him. Kevin stated that his back was towards Spaight Street, and that he heard someone come up from behind him and it turned out to be a police officer. Kevin stated that his first thought was that perhaps the person coming up from behind him was a neighbor. Kevin stated that once he realized that an officer was on-scene, he felt relieved that he didn't have to scream for help. Kevin stated that he noticed it was a police officer when he saw the police officer with the officer's handgun out of its holster, with the gun pointed towards Paul. Kevin also stated that he recalled thinking that he hoped the officer knew who the suspect was. Kevin stated that he recalled hearing the officer yell, very loudly, "Get down, get down!"

Kevin O'Malley provided a demonstration of this interaction with Heenan, which was videotaped as part of the criminal investigation. I have reviewed this video and find the re-enactment consistent with these accounts, that is, that K O'Malley depicts being grabbed at the shoulders and pushed backwards and is taking steps backwards himself, by Paul, a neighbor he recognized from meeting the prior weekend.

Upon seeing the struggle, Officer Heimsness drew his firearm and continued to approach the two, making a radio transmission that there was a fight. In his statement to me, Heimsness recalled wanting to close the distance somewhat at this point before verbally engaging the subjects, indicating his fear that if he was too far away the suspect in the burglary would run off into the dark and be difficult to locate (**Heimsness interview 11/29/2012 transcript page 6**). O'Malley also recalled looking over his shoulder for assistance during the struggle, and seeing the Officer, gun out, continue to take a few steps towards them before giving the verbal instructions (**MRF page 457 line 338**).

Heimsness began to give verbal orders to "Get Down!" as he pointed his firearm at the suspect while pointing his left hand at the suspect as well. (MRF page 157):

PO Heimsness said he knows that this is a serious incident so, "I gunned the guy, mostly the suspect, and I yell get on the ground now". Detective Riesterer asked what he was doing when he pulled his gun out. PO Heimsness said "I yelled get on the ground now. They both looked at me. The husband lets go and goes away. I'm probably 15, 20 feet away by now." PO Heimsness said the suspect then turns towards him. PO Heimsness said, "I took my non gun hand and I point at him and I yell, you get on the ground, get on the ground now." PO Heimsness said that he has his gun in his right hand and he is using his left hand to point at the suspect and he is giving loud orders, telling the suspect to get on the ground. PO Heimsness said the suspect ignores him and "he walks quickly towards me. He's saying 'no, fuck you god dammit, no, fuck you god dammit.' He gets up on me quickly and I back up to get distance."

At that point K O'Malley was able to disengage from Heenan and backed away (**MRF page 453**). Heenan turned his attention to Heimsness and advanced on him quickly. This movement was described by both Heimsness and K. O'Malley as not running, but rapid. Heimsness described trying to take rolling steps backwards but O'Malley being in contact with him quickly. Both O'Malley and Heimsness describe Heenan as grabbing at Heimsness, and pushing and

grabbing at Heimsness' left hand and arm, with Heenan's right hand, as if to try and move it out of the way. According to Officer Heimsness, with his left hand, Heenan was grabbing at Heimsness' firearm, which remained in Heimsness' right hand, with Heenan's left hand. O'Malley has made various statements as to what Heenan was doing with his left hand. In his initial statement to Detective Esser (MRF page 134) he stated the following:

Kevin stated that right after the shooting occurred, he ended up going into his house. Kevin could not describe exactly how close or how far away he was from Paul and the officer when the officer shot Paul, but in general stated that he was pretty close, standing in his driveway and that the shooting occurred on the sidewalk at his driveway. Kevin stated that he moved away and into his driveway to get away from the officer who had his gun out. Kevin stated, "It seemed like Paul was going at the police officer's gun." Again, Kevin reiterated that once Paul noticed the police officer on-scene, Paul redirected his attention towards the police officer and said out loud, "Oh, you now." I asked Kevin if Paul's engagement with the police officer was aggressive, and Kevin stated, "Yes." Kevin stated that Paul turned from an intoxicated person who was having a hard time speaking into an all-of-a-sudden very different person.

I asked Kevin if he felt that the police officer was readily identifiable, and Kevin stated, "He was to me." Kevin did state, however, that it was very dark outside, but, even though it was dark outside, he was able to identify that there was a uniformed police officer on-scene. I asked Kevin if Paul physically touched the officer's gun, and he stated that he did not know for sure. I asked Kevin why it was that he could not say for certain whether Paul had grabbed the officer's gun, and he stated it was because he was moving very quickly in an effort to try to get away from Paul and the officer's physical struggle.

On page 140 of Detective Esser's report from this same interview (MRF page 140):

O'Malley demonstrated with his hands that when he pulled away from Paul, Paul did not get down on the ground and instead was waving his hands in front and was walking toward the police officer. O'Malley explained that he was unsure if Paul had gone after the officer's gun, stating that everything happened very fast and that this whole thing lasted "ten to fifteen seconds."

Kevin O'Malley and Heimsness both describe (MRF page 458 O'Malley, MRF page 157 Heimsness) Heimsness moving his firearm away from Heenan. I have reviewed the video of the interview with O'Malley and note him to demonstrate this as Heimsness, at that point, with both hands on his firearm, moving the weapon down at an angle to his right (at 34:01 on the video).



During this time, O'Malley states he was both moving around the officer and Heenan, and yelling that the subject was "my neighbor!" Heimsness was yelling at Heenan to "Stop" and "get back" commands that were heard by Officer Troumbly (MRF page 111) and also another person in the area (MRF page 107, witness at 5■■■■ S Baldwin St #■■■■). Heimsness stated he heard nothing else, thus not hearing anything from Kevin O'Malley during this time.

Some amount of separation occurred between Heenan and Heimsness, and Heimsness re-positioned himself in a two-handed hold on his firearm. Heimsness then fired three rounds at Heenan. Heenan was struck by all three rounds and went down on the sidewalk, where he expired soon after.

There is some variation in the recounting of events as to the distance created between the 2 when the rounds are fired. O'Malley appears to either not recall or perhaps (he was moving just prior) not have seen the actual separation occur. He describes just prior to the shots seeing the 2 with some separation and standing more upright than he saw previously (MRF pages 459-460):

GE: Now, when we talked that morning in your house it, um, I mean – is it accurate to say – what I

434 believe you had told me was that you really weren't sure how the disengagement happened.

Is that accurate?

436 KO: The disengagement between –

GE: The separation between – so you have Paul and the officer, who are really, as as I think you're

438 describing it, in very close quarters here.

KO: Mm-hmm.

440 GE: Um, and there's some physical-ness going on between the two – is that accurate?

KO: Yes.

442 GE: OK. That morning, it seemed to me like you were having a hard time remembering or you didn't remember, or you maybe just didn't notice how the separation occurred. Is that accurate

444 or do you – do you now have a stronger recollection of how –

KO: [Unintelligible] – what I know is that both of them were standing taller than when they were

446 squatting and and –

HH: At what point in time.

448 KO: Pardon?

HH?: At what point in time?

450 KO: When it – when I was at the driveway, um, as I said, when I first turned around, they were in more or less the same position as –

452 GE: So, you're in the driveway, you get to this position, roughly speaking, and you think they're still roughly in the same position.

454 KO: Yes.

GE: OK...

456 KO: It...it was a matter of seconds, but I saw Paulie's eyes, um, and I saw the police officer get in a position stance, where one might expect he he could shoot and and I saw that separation that

458 that was created to allow Paul to stand more upright, for me to see his eyes, standing in our driveway.

460 GE: If you would – I'm kinda curious about that eh... So... if Detective Riesterer is still Officer Heimsness and you're Paul, and I'm you now, if you will, in the driveway, the street is is

462 essentially that wall there. Um, and you're you're watching this. Now, how far are you from

this, now – now that you've moved around to the driveway – roughly how far are you –

464 KO: I would say 15 to 20 feet.

GE: OK, again, you were close to that stoop with that light.

466 KO: Yes.

GE: OK, from the neighbor's house. Um, now, you you you – the first time you told the story, you

468 were very ahh articulate about seeing Paul's eyes. Describe it to me how – eh eh is it that

Paul turns and looks at you or have you moved into a position where you – cause, as I'm

470 standing, I would think, and I don't want to assume, that their eyes would be roughly at each other.

472 KO: Well –

GE: Maybe it's not that big of a point, but you –

474 KO: As I said, I I noticed it was at that exact series of seconds that I noticed the second police officer.

476 GE: OK.

KO: Um, so, just as there was a triangle with me here, Officer Heimsmith – whatever, however –

478 [crosstalk] – here and Paul here. When I was standing down the driveway, the triangle was

the second officer, Paul, and and the other officer. So, um... Paul, in looking up, I don't know

480 what he was looking at, but just as I noticed the presence of the second officer, it may have

been that he noticed that as well. I I don't know.

482 MR: OK.

GE: OK.

484 KO: So –

[Crosstalk]

486 HH: I think it would be helpful, cause the point you were – you sort of broke off. Would you just, with the officer, re-enact what you saw from the driveway from the moment you got to the

488 driveway and turned around.

KO: Yeah OK.

490 HH: In terms of what each was doing and what the distances were.

KO: Right. It was essentially that that sequence of of, um, how you get from that position of of

492 someone swatting at you to putting yourself into position to shoot, so you take a step back –

MR: OK, I don't –

494 GE: So the officer took a step back – is that what you – I want to make sure I just understood what you just described, if that was the officer or Paul?

496 KO: Yes.

MR: If you just want to –

498 KO: It was it was the officer –

Kevin O'Malley is fairly consistent in his statement that Heimsness and Heenan were approximately 5-6 feet apart when the rounds were fired (MRF page 461). Heimsness has placed them closer together in his statements, indicating that he was able to push Heenan back enough to keep his weapon clear and obtain a 2 hand hold, as well as squaring his body. Heimsness estimated he and Heenan were 2 ½ feet apart when he fired (MRF page 164):

Detective Riesterer said to PO Heimsness, will you show us the distance between you and the suspect when you delivered your rounds.? PO Heimsness said he is estimating that he was about 2 ½ feet away. PO Heimsness said, because when I did it, the shove was weak, he (suspect) did go back like this. PO Heimsness said and demonstrated that he shoved the suspect with his left hand. Detective Riesterer asked if his left hand is his non- dominant hand. PO Heimsness answered yes. Detective Riesterer asked what happened after he shoved the suspect with his left hand. PO Heimsness said he saw the suspects upper body move backwards. PO Heimsness said that he had tunnel vision and he only saw about 3 feet around. Detective Riesterer asked what PO Heimsness saw. PO Heimsness said that he saw the suspect from about his (suspect) belt line to his head. PO Heimsness demonstrated this by positioning himself with his feet almost touching Detective Riesterer's feet and his body is about 2 ½ feet away. PO Heimsness said his arms are closer because he had his gun in his hands. PO Heimsness said he gave the suspect a shove and the suspects upper body moved backwards so the suspects upper body was moving away from him when he fired. PO Heimsness said he does not know if the suspects feet moved.

Officer Troumbly's statement to Detective Buechner (MRF page 110) is that she volunteered to respond to the burglary in progress call, and parked her marked squad car southbound at the west curb of S Baldwin St, just north of Jenifer St. She exited the squad and began walking in a southeasterly direction. Troumbly heard the dispatched description of the homeowner, and saw a subject matching that description walking back and forth in front of 513 S Baldwin St as she approached (MRF page 111):

She reported that as she was approaching the area of where Officer

Heimsness was out with the two other subjects, she saw a male in the gray shirt, later identified by the command post as Kevin O'Malley, moving back and forth from the sidewalk in front of 513 S. Baldwin to the porch of 513 S Baldwin St. She told us that she was aware of O'Malley's presence, but did not focus on him when she was approaching as his clothing matched the description of the caller's husband that was aired by Dispatch. She stated that as she was approaching 513 S. Baldwin, she heard Officer Heimsness command "get back" and "stop."

Officer Troumbly reported that she saw Officer Heimsness in a physical confrontation with a male wearing a black jacket, who was later identified by the command post as Paul Heenan. She stated that this confrontation was taking place just north of the porch of 513 S. Baldwin on the sidewalk. She told us that Heenan was standing with his back in her direction and between her and Officer Heimsness. She stated that she observed Officer Heimsness and Heenan going from side to side and Officer Heimsness continued to give commands of "stop," "back," and "get back" to Heenan. She stated that she was also able to observe that Officer Heimsness had one arm out pushing Heenan back in an attempt to create space between him and Heenan. She stated that seeing Officer Heimsness's actions and hearing his verbals, she knew that Officer Heimsness was in distress so broke out into a sprint toward Officer Heimsness's location. She stated that as she was sprinting, she pulled out her taser with her right hand, going across the front of her body, bringing the taser out of the holster. She stated that as she was bringing the taser up from its holster, she heard "pop, pop, pop" which she believed to be gunfire so she holstered her taser and drew her firearm. She estimated that she was approximately 10 to 15 feet away from Officer Heimsness and Heenan when she heard this gunfire.

Officer Troumbly later did a scene walk-through with Detective Buechner. At that time she provided the following detail (MRF page 113):

When we started the walk through, Officer Troumbly pointed out the bus shelter where she parked her squad. This bus shelter is located on the west side of the 400 block of S. Baldwin St just north side of Jennifer Street. She reported that when she exited her squad, she saw Officer Heimsness flash his flashlight indicating to her that he was walking to the east side of S. Baldwin Street in the 500 block. She stated that she walked diagonally from her squad to the east side of the 500 block of S. Baldwin crossing Jennifer Street. She pointed out that as she was walking up the corner curb approaching the sidewalk she saw that there was a physical confrontation occurring near the middle of the 500 block of S. Baldwin. She stated that there was an orangish/yellow light illuminating Officer Heimsness. She stated that from her prospective, Officer Heimsness was standing to the left of Heenan facing him. She told us that she saw Officer Heimsness push Heenan back with his left hand. She estimated that Heimsness and Heenan were not more than 1 ½ to 2 feet apart at this time. She told us that she did not see anything in Officer Heimsness's or Heenan's hand. She stated that Heenan then moved in front of Officer Heimsness so she could no longer see Officer Heimsness. Officer Troumbly told us that she could hear Officer Heimsness give loud and direct orders to Heenan telling Heenan to "stop" and "get back" as she was approaching.

Officer Troumbly reported that when she approached the driveway between 503 and 507 S. Baldwin St., told dispatch she was "23" and began running toward Officer Heimsness and Heenan. She stated that she normally tells dispatch that she is "23" as she is approaching a call in her squad. She told us that did not know why she waited until she was approaching the scene on foot to tell dispatch she was "23."

She told us that she saw that Officer Heimsness and Heenan were in a physical altercation so she began drawing her taser as she was approaching the front of 509 S. Baldwin St. She reported that as she was just to the south of the porch of 509 S. Baldwin St, she heard “pop, pop, pop” so put her taser back in the holster and drew her firearm. She told us that she had her firearm drawn just before she approached 511 S. Baldwin St. Officer Troumbly advised that she witnessed Heenan stagger backwards for two steps and then fall back with his head landing near the light pole just north of the approach to the driveway for 511 S. Baldwin and his feet were on the landing to the approach of this driveway. She stated that when Heenan went down, she saw that Officer Heimsness had his firearm drawn. She reported that she saw O’Malley out of the right side of her vision and stated that O’Malley was standing near the street on the southwest corner of the terrace near the approach of the driveway when the shots were fired. She reported that after the shots were fired, O’Malley walked into his house.

****When I spoke with PO Troumbly on November 19, 2012, she provided the following clarification as to the distances involved when the shots were fired by Officer Heimsness (Troumbly Transcript 11/19/2012 page 3):**

Q: And is it, am I, is it my, am I correct in my understanding that the subject who’s, who ends up being shot is between Officer Heimsness and you?

A: Correct.

Q: Are you able to give any kind of an estimate of the distance between Officer Heimsness and the subject who was shot when the shots went off?

A: I’d say no more than three feet, probably two.

Q: So very . . .

A: They were very close together.

Q: Very close together. And from reading the statement, it sounds like your view of Officer Heimsness’ fire arm, was obstructed when the shots went off?

A: As I remember.

Q: Okay.

A: Yeah.

Q: Do you remember seeing the flash?

A: I don't. I remember when Paul stepped back. I remember seeing Officer Heimsness in his platform stance with his firearm out at the . . .

Q: And was that after the shots went off?

A: Yes.

Q: So the shots had already gone off?

A: Yes.

Q: So Paul Heenan, was it his body that was blocking your view of the firearm?

A: Yes.

Q: Okay. But you could see them well enough to see roughly how close together they were?

A: Yeah.

Q: Okay. And you were in, you were in a full run at this point?

A: Yeah.

Q: Right. Okay. Let me just clarify this, this one thing with you, Stacy, because I, Mr. Heenan is between you and Steve . . .

A: Uh huh.

Q: When the shots go off. So what is it about their positioning that . . .

A: 'Cause they were touching each other.

Q: They were touching each other.

A: Yeah.

Q: What parts of them were touching?

A: I saw pushing and I guess I didn't see exact hands but you see motions and shoulders and you see someone moving. I guess I assumed there was pushing back and forth.

Q: And so is that what, what's, is that what gives you that estimate of the distance between the two of them?

A: Yeah.

Q: Is their physical contact with one another?

A: Yes.

After the shooting occurred, it was determined that the subject who had been shot was likely a neighbor from 2 houses away. He was identified as Paul Heenan, dob 8/29/82.

On December 26, 2012 I received an electronic copy of a report from William Newhouse of the Wisconsin state crime lab. Mr. Newhouse is a firearms examiner. Mr Newhouse had conducted test firings and examined clothing worn by Heenan when he was shot. Newhouse concluded that the muzzle of Heimsness firearm and Heenan's coat were 24-42" apart when Heenan was shot. I note that this finding is very consistent with the distance estimates provided by Officer Heimsness and Officer Troumbly.

This concludes the factual summary of events. I will refer to additional information from the criminal investigative reports, as well as my interviews and investigation as I move ahead with the investigative documentation.

Interview-Troumbly:

On November 19, 2012, I reviewed Detective Buechner's report regarding her interview with Troumbly. I also made telephonic contact with Buechner and verified that she had allowed Troumbly to read the report and verify it's accuracy prior to finalizing it. Buechner advised me she had, at Troumbly's direction, made a couple of minor corrections to the report. At approximately 2:00pm Officer Troumbly arrived at my office for an additional interview, accompanied by MPPOA representative Jason Freedman. Also present was Lieutenant Kristin Roman. The interview was recorded and transcribed.

Troumbly verified that she had, in fact, read Buechner's report when it was in a draft form and provided a couple of minor corrections prior to it being finalized. Troumbly told me through the course of the interview that she was confident that Detective Buechner had captured her statement accurately.

In reviewing Detective Buechner's report, I had not seen a reference to Troumbly's perspective of where the parties involved were in relation to one another when the shots were fired. I asked Troumbly if she could describe this to me (Troumbly Nov 19 interview with PSIA, page 2) and she relayed the above information (last section of the factual summary above).

Officer Troumbly went on to verify information she had provided to Detective Buechner, indicating that as she had approached, she had heard Officer Heimsness giving verbal commands to the subject he was in the physical altercation with (Troumbly Nov 19 PSIA interview, page 4):

Q: And you talked about hearing Officer Heimsness giving orders, right?

A: Uh huh. That's what really got me sprinting instead of hussling.

Q: What was it about, about those orders that really got you moving?

A: I've heard Officer Heimsness give orders before and these were different. I mean they were the same words but it felt different. It felt more urgent like he was in distress.

Q: And so the tone, the volume?

A: Yeah.

Q: Were they faster than they usually are?

A: That'd be speculation.

Q: Okay.

A: I would assume so.

Q: And do you and again I understand you're running, do you remember hearing any other sounds during that time?

A: No. The only other thing I remember hearing is the complainant was behind him and he said something to the effect of oh my God and then went running back into the house.

Q: And that was after the shots were fired?

A: Yeah.

Q: Do you remember hearing anything from the complainant before then?

A: No.

Heimsness Interview:

On November 28, 2012 I made contact with Joe Durkin of the WPPA. I provided Durkin with an interview notice for Officer Heimsness for the following day, November 29, 2012.

Heimsness and Durkin arrived at the PS&IA offices for his interview on November 29, 2012 at 8:30am. Heimsness was given an Investigative Directive Memo which compelled him to make a statement. It should be noted that at the time of the interview, District Attorney Ozanne had not

issued any determination regarding the criminal investigation as to criminal liability. The interview was recorded and transcribed.

Heimsness had, at that point, made voluntary statements which included a lengthy interview, a shorter interview, and a scene walk-through. Because of these prior statements of which I was at that time aware as I had been monitoring the criminal investigation, I determined to limit my questioning to clarifying information that would be helpful for my review. The portions of Officer Heimsness' interview that are relevant to the use of force evaluation are included below, and the entirety of the transcript is attached.

Kevin O'Malley:

Kevin O'Malley was interviewed 4 times in the course of the criminal investigation. He spoke with Officer Zulma Franco at his home shortly following the shooting, and then again later in the morning with Detective Esser, again at his home. On November 15, Detective Riesterer was contacted by attorney Hal Harlowe, who arranged a recorded interview with investigators and Mr O'Malley on November 16, 2012. On November 16, there was an extensive and relatively comprehensive interview with Mr O'Malley in an interview room which was video and audio recorded. Following this interview, there was a physical demonstration performed by Mr O'Malley which was video-recorded and which includes many statements about the events surrounding the shooting.

Mr O'Malley has made various statements about his perception of what was happening when he was being grabbed and pushed by Heenan. He described looking around for help, and not necessarily being fearful for his safety but needing assistance with Heenan. It's interesting to note that at one point O'Malley considered whether or not to attempt to take Heenan to the ground (MRF pages 475-476):

HH: They were asking you if you had anything more to say.

KO: Mm-hmm.

182 HH: When you – when you talked earlier, you were expressing your view about whether you were threatened –

184 KO: Oh.

HH: - or fearful.

186 KO: And I think it's with, with the arm thing, um – and – I – I think it's the fact that I was turning to call for help, I – I – I wouldn't turn to call for help, if I felt like a punch was going to be thrown. I

188 – I didn't feel like that's where this was going.

GE: What would it take for ¹⁹⁰ you to feel in danger then, though?

KO: Uh, someone throwing a punch at me. Someone trying to tackle me. Somebody kicking me.

192 Um, somebody elbowing me in the face and then running towards my house. Um, moving a

lot quicker than – than how we were moving. Not willfully being part of the movement, in the

194 form of – of back pedal. A lot of factors would have – would have made me feel more in fear

of – of, uh, you know...

196 **GE:** One thing you articulated to me that morning was that you were thinking, “How am I gonna get out of this?”

198 **KO:** Yeah.

GE: Is that accurate?

200 **KO:** That is accurate. Be – and – I remember looking down at his leg and thinking, “Can I sweep

his leg and throw him down?” Uh, and I decided I couldn’t, um, but yeah, it was – it was one of

202 those thoughts – “How am I gonna get out of this?” And, and –

GE: And, is it also fair to say that you were thinking that you did need some help?

204 **KO:** Yes.

O’Malley demonstrated Heenan’s movements towards him in the second interview on November 19, 2012. The following image is from that demonstration:



O’Malley demonstrated being pushed away from Heenan’s residence almost all the way to his own residence and looking over his shoulder for help (Note O’Malley is acting as Heenan in these images):



Mr O'Malley has also been very clear that he was not staring directly at the physical confrontation which occurred between Heimsness and Heenan the entire time it was occurring-he was moving and trying to stay out of the way (MRF page 454 line 150). O'Malley has, however, given various descriptions of the physical confrontation between Heimsness and Heenan which will be referred to below.

Use of Force evaluation:

I will be evaluating the two use of force decisions made by Officer Heimsness during the course of this incident, first being his decision to confront Heenan at gunpoint, and second, his decision to deploy deadly force.

“Any police use of force must be “objectively reasonable,” according to the US Supreme Court case, *Graham v. Connor*. Objective reasonableness is measured in part by the following questions:

- Is the suspect an immediate threat to officers and/or others?
- Is the suspect actively resisting seizure?
- Are the circumstances tense, uncertain, and/or rapidly evolving?
- What is the severity of crime(s) at issue?
- Is the suspect attempting to evade seizure by flight?

Initial contact:

Officer Heimsness' initial contact with Paul Heenan (and Kevin O'Malley) occurred when Heenan was in a physical struggle with witness Kevin O'Malley. Heimsness described his initial response when he approached the area on foot, of trying to evaluate the situation by listening and looking around. It is only when he observed the homeowner and an unknown subject in a physical confrontation that he drew his weapon and confronted the suspect at gunpoint (MRF page 159). Officer Heimsness was able to differentiate between O'Malley as the likely homeowner (based on the clothing description he was given), and Heenan as a possible suspect

in a burglary in progress, based on the information he was aware of at that moment in time. In this context, Heimsness' use of his presence (as a uniformed police officer), covering the suspect with his firearm, and loud verbal commands to the suspect of "get on the ground" must be examined.

The first question to address is, "Is the suspect an immediate threat to officers and/or others?" Officer Heimsness was aware of the following information:

1. He was responding to a burglary in progress, where the caller had heard someone in the house.
2. He was aware that the homeowner had gone out to investigate.
3. He could see someone who he believed to be the homeowner in a physical struggle with another person.
4. He was aware that there had been burglaries in the general area, and that earlier in the summer there had been strong armed and armed robberies in the area and that sometimes bar goers had been targeted (MRF pages 154-155).

To answer the first question, would a reasonable officer consider the suspect an immediate threat to officers and/or others, the answer is clearly yes in this context. A possible burglary suspect in a struggle with a homeowner would certainly be considered a threat to the homeowner.

The second question, "is the suspect actively resisting seizure?" is, at this point, not applicable.

The third question, "Are the circumstances tense, uncertain, and /or rapidly evolving?" can also be addressed. In this circumstance, Heimsness went from trying to evaluate the situation to seeing a physical struggle occurring in front of him. It is reasonable to consider a physical struggle between a homeowner and a possible burglar to be "tense", "uncertain" (unknown weapons, unknown accomplices), and the situation was changing in front of Heimsness eyes.

The fourth question involves the severity of the crime in question. In this case, the incident was dispatched as a felony, a burglary-in-progress. In addition to that circumstance, Heimsness was also viewing a potential assault on the homeowner.

The fifth question "Is the suspect attempting to evade seizure by flight?" is interesting in this context, because it's not necessarily clear to the observer (Heimsness) what the suspect is doing-He is struggling with the homeowner, but it is not known if he was attacking the homeowner, or trying to get away. Either of these options, to a reasonable officer, trigger a response in these circumstances.

I believe it is objectively reasonable for an officer to use force in this situation (in this case Officer Heimsness) given the answers to the above 5 questions. For the specific force to be justifiable within Wisconsin DOJ Firearms and DAAT Training Guide for Law Enforcement Officers it must fit into one of these categories:

1. A trained technique.
2. A dynamic application of a trained technique.
3. A technique not trained, but justifiable under the circumstances.

The question then becomes whether the act of Heimsness drawing his firearm, covering the suspect, and issuing loud verbal commands fits into one of the three categories. It should be noted that I have consulted with Officer Kimba Tieu of the Madison Police Department, a current member of the Madison Police Department training staff, regarding this investigation. Officer Tieu is a DAAT instructor, firearms instructor, and instructor in the investigation of police use of force. I have consulted with Officer Tieu in the past regarding use-of-force investigations, as well as other training questions, and value his professional and objective opinion.

A comparable situation would involve the stopping of a stolen vehicle. Officers are trained to conduct a “high-risk stop” which involves covering the vehicle and occupants at gunpoint, issuing verbal commands, and tightly controlling and handcuffing all occupants of the vehicle. Officers are trained to handle stopping occupied stolen vehicles in this manner, even if they have no current information as to weapons being in the vehicle or direct knowledge of the circumstances under which the vehicle was stolen. This factor of the unknown when addressing serious and oftentimes dangerous criminal conduct such as stolen vehicles, burglaries in progress, and robbery alarms prompts officer to use caution and Officers, when faced with suspects in these types of crimes will often cover suspects with their firearms. In the course of this investigation I noted Madison Police Case#2012-352653, which involved the arrest of a burglary suspect who was found to have a handgun in their backpack.

Officer Tieu described “High Risk” training protocol to me, which also includes clearing a suspected burglary scene. Officers are trained to address “High Risk” situations with guns out. Tieu explained that Officers are trained to place themselves in a position of advantage wherever necessary to address the “reactionary gap”. That is, there is cognitive processing time that occurs for officers facing a threat. If officers believe it possible that an armed threat might be present, they are trained to not wait for a subject to pull out a firearm before drawing their own gun, as the officer would then be at a clear disadvantage, but to draw their weapon and cover to be better able to respond to a deadly threat.

Officer Heimsness does not appear to have verbally identified himself as a police officer when issuing the verbal commands to Heenan. He was, however, in full military style police uniform. The area also appears to be sufficiently well lit that Kevin O’Malley was able to see that Heimsness was a police officer almost immediately upon seeing him. Officer Tieu explained that Officers are trained to get the important information out first when giving commands-thus, in this circumstance, the priority was to get instruction to the suspect who appeared to be struggling with the homeowner. Officer Tieu’s opinion was that it would be consistent with training to issue the initial commands of “get down!” “get on the ground!” without a verbal indication of “police” given that Officer Heimsness was in full uniform, and the reality that no one other than police typically issues those type of orders.

It is important to address Heimsness decision to deploy his sidearm in this circumstance because the following action is in a large part determined by the fact that Heimsness’ handgun is out and in hand. I have determined that Officer Heimsness’ initial use-of-force, that of his uniformed presence, covering Heenan with his firearm, and issuing loud verbal commands, was an objectively reasonable application of a trained technique in this circumstance.

Deadly Force Decision:

Mr. Heenan, upon becoming aware of Officer Heimsness presence, immediately re-focused his attention, both visually and physically, on the officer. While it is not entirely clear that Heenan recognized Heimsness as a police officer, Heimsness described Heenan as being visually focused on his firearm. It is also important to note that O'Malley described a distinct change in Heenan's behavior just prior to this when he (O'Malley) mentioned that he could have contacted the police. It was at the mention of police that Heenan made the statement, "Oh you want to get weird?" (MRF page 122) and began advancing on, grabbing and pushing O'Malley. In this context, and when adding the additional information of Heimsness issuing loud verbal orders (Get Down! Get on the Ground!), and being in full police uniform, it appears likely to me that Heenan recognized Heimsness as a police officer.

Heenan's actions have been described by Heimsness and O'Malley. O'Malley, in fact, provided 2 physical demonstrations to Detectives on November 16, 2012 which were captured on audio and video. It appears Heenan moved quickly towards Heimsness on the sidewalk and closed the distance rapidly. Figure 1 below is O'Malley's demonstration of this initial movement during his demonstration. O'Malley, in the blue shirt with rolled sleeves, is acting as Heenan, Detective Riesterer in the white t-shirt and blue plaid shirt, is acting as Officer Heimsness:



Figure 1 Briefing room interview 5:07 minutes

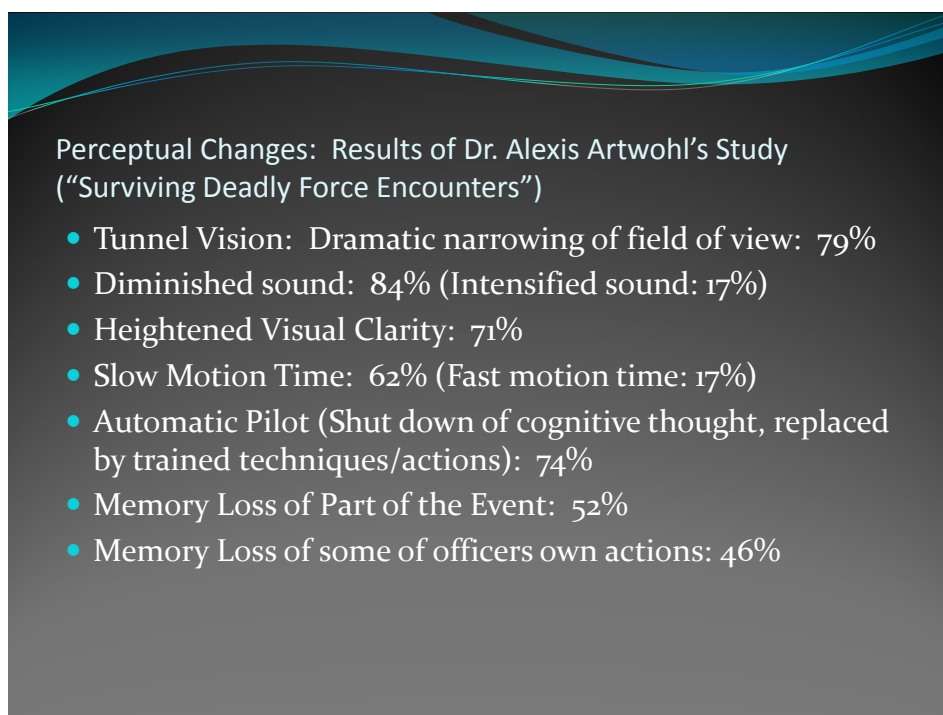
Heenan was swinging his arms at Heimsness, and from Heimsness' statement, was staring at the firearm in Heimsness' right hand. Heimsness described Heenan as reaching his left hand at the firearm, while grabbing and pushing at Heimsness left hand and arm with his (Heenan's) right hand. Heimsness attempted to back up some distance but became concerned about falling with Heenan on top of him.

Heimsness' Perception of a Deadly Threat:

Officer Heimsness has described his perception of a deadly threat to his safety. There are several points of information he described which speak to this perception. If, in fact, Mr O'Malley was stating or yelling something regarding Heenan being a neighbor, Heimsness would appear to have not heard or processed that information. The information itself would not negate Heenan's action of aggressing on the officer and grabbing towards his weapon in and of itself, but it is of note that Heimsness has no recollection of O'Malley saying anything prior to the shots. Officer Troumbly also has no recollection of hearing any yelling other than Heimsness', and it is entirely possible that Heimsness' voice was drowning out anything O'Malley was saying. Auditory exclusion does, however, often occur in deadly force encounters and it would not surprise me that an officer engaged in an active physical struggle with someone they perceive as attempting to grab their gun would not process some of the sounds happening around them. Additionally, Heimsness described the shots sounding muffled when fired, another symptom of auditory exclusion.

Heimsness also described having some tunnel vision, another physiological response that can occur in deadly force encounters. He described completely losing sight of O'Malley once he separated from Heenan, and further described only seeing about a 3' radius of Heenan when he fired his weapon.

Doctor Alexis Artwohl has studied the perceptual changes which occur on the part of officers involved in deadly force encounters and surveyed officers involved in these situations. Her findings were published in the October 2002 FBI Law Enforcement Bulletin (article attached). Doctor Artwohl identified the frequency of the following perceptual changes in these officers:



The most compelling information, however, regarding Heimsness' perception of a deadly threat to his safety comes from Officer Troumbly. Troumbly has very clearly stated that she has worked with Heimsness in the past. When she heard him yelling at Heenan during the physical struggle (which she could see), Troumbly stated she could tell something was very wrong by the sound of Heimsness' voice. She was so concerned by Heimsness voice that she immediately began sprinting towards Heimsness as she drew her ECD. It is clear to me based on these factors that Heimsness was in fear for his life. The question now becomes whether a reasonable officer would perceive a deadly threat.

It is important to note at this point that both Officer Heimsness and Kevin O'Malley made mention of the force with which Heenan grabbed them. Heimsness indicated he felt pain in the fingers of his left hand (where he was grabbed) for some time after the incident (MRF page 157). O'Malley discussed being able to tell he was grabbed on the forearm for some time after the incident as well, not that it was specifically painful, but that he was grabbed with some force. Inv Parr photographed possible scratches on O'Malley's right forearm (MRF page 72) where O'Malley indicated he was grabbed by Heenan "with a lot of force" (MRF page 135).

I know from my own training as a police officer that I should consider being disarmed as a deadly threat to my safety. Officer Heimsness describes Heenan as staring at Heimsness' firearm, and reaching for it. Heimsness also described being able to see Heenan's fingers inches away from the barrel of his weapon as he was trying to keep him back (Heimsness PSIA interview Nov 29 page 15):

A: The most visual, vivid thing I remember is him grab, I'm looking at his eyes and his face when he's in physical contact with me, inches away, staring at my gun and grabbing at it. That's the thing that, you know, when the thing plays over in your head, you know, a million times like it does, that's what I see all the time. When, not walking up, that's what keeps flashing through my head when I think about this, it's him target locked onto my gun with his eyes, staring at it and grabbing, trying to grab that gun out of my hand.

Heimsness stated several times in prior interviews that he was in fear for his life because Heenan was trying to take his gun. When we spoke on November 29, 2012, I asked Heimsness to clarify this, and also to clarify what, in this specific situation, caused him to fear for his life (Heimsness PSIA interview Nov 29, page 11):

Q: Okay. Steve, you've talked about, you know, kind of coming to point where if he disarms me, he's going to shoot me.

A: Uh huh.

Q: Can you, can you just tell me how you come to that conclusion?

A: Well, as far as I know, there's only one reason someone takes a gun away from a cop and that's to shoot 'em so when someone's gonna try to take my gun and I think that's been born out as well in statistics and studies that when cops get their guns taken away from them, they get shot with them and that's what I was, you know, that's what I'm thinking.

Q: Okay.

A: He, if someone takes my gun, they're gonna use it on me or somebody else but at least initially on me.

Q: The and the reason I'm, I'm asking you that, that question specifically again like we talked beforehand I, it's something that I, I need you to articulate because the other, the other half of that and from what I'm hearing you say, from what I'm hearing you, Steve, that's something that you've learned from your training and experience . . .

A: Yes.

Q: As a police officer.

A: Absolutely.

Q: The training and experience that says that police officers consider being disarmed a lethal threat.

A: Yes. Absolutely.

Q: The other half of that in this situation is I want to give you an opportunity to tell me if there's something that was happening that also lead you to that conclusion.

A: Well it was based on everything that was going on that he aggressively came after me. He aggressed on me. He had, what you want to call it, target lock on my gun that he was clearly focused on it, that he was making clear and, and strong aggressive moves to get to my gun and to grab onto it, which I believed to take it from me and then he was not following my lawful orders. It was a very unusual reaction. If you order someone to the ground at gunpoint, they're, unless for whatever reason, I can't imagine why you would not comply especially in the sense, in the situation where now you turn on an officer and then physically attack them. It makes no sense. It's very out of the ordinary. Oftentimes, I've had it occur as well that when you order someone to the ground at gunpoint, they don't immediately comply but they also don't physically attack you. They stand there and they verbally challenge you and, and then eventually get down on the ground. They don't, they may not immediately get down but I've never had, I don't ever recall anyone ever physically attacking me after I've placed them at gunpoint, ever, in 15 years so this was a very unusual situation and when combining all those things together, I believed he was going to try to take my gun and kill me. Well, it was a very extraordinary event.

Special Circumstances:

The Wisconsin DOJ Defensive and Arrest Tactics Manual discusses a number of factors which affect an Officer's threat assessment. Many of the factors listed appear to be relevant to this situation, and have been listed below. (DAAT manual, page 27) Any one, or combination of these circumstances, could justify higher levels of force:

“Special Circumstances

A number of other factors affect your threat assessment. Some of these include:

-Reasonable perception of threat. The actions you take must be based on your reasonable perception of the threat. Your perception—that a subject was armed with a gun, for example—may turn out to be incorrect (e.g., the "gun" was a toy pistol), but if

your perception was reasonable, your action in response to that perceived threat may well be justified nonetheless.

-Sudden assaults. Naturally, if the subject assaults you, another officer, or someone else, your assessment of the threat posed by that subject should increase.

-Subject's ability to escalate force rapidly. Even if the subject does not actually assault you, his or her ability to do so should affect your threat assessment. Examples of factors to consider include ready access to weapons (actual or improvised), physical abilities, and relative positioning.

-Your physical positioning. How you are positioned relative to the subject may affect your threat assessment. For example, if you are at a tactical disadvantage, your threat assessment would be higher than if you were in a better position.

-Availability of backup. If backup is far away or not available, your threat assessment may be higher than if you could count on immediate help if needed.

-Other special circumstances. Many other issues may enter into your threat assessment, such as the presence of other people, special knowledge of the subject or circumstances, etc. “

Regarding this specific situation, the first point, “Reasonable perception of threat”, is relevant in that it speaks to Officer Heimsness’ perception that he was dealing with a burglar, based on the information he was given. The fact that Heenan turned out to be living in a residence 2 doors down from the O’Malley’s and may have been entering the home in error is irrelevant to Heimsness initial perception as the information was unknown to him at the time.

“Sudden Assaults” is particularly relevant to this situation. Officer Heimsness sees first a possible assault on a homeowner, and then he himself experiences an assault by Heenan.

“Subject’s ability to escalate force rapidly” It is important to note that when Heimsness and Heenan achieve some level of separation, Heenan remains on his feet, and at the most is approximately six feet from Officer Heimsness, facing his direction (It should be noted that Officer Heimsness and Officer Troumbly place Heenan much closer to Heimsness when the shots are fired, 2-3 feet). A single step forward from this distance would bring Heenan back into a position where he could reach Officer Heimsness’ firearm. The following image taken from O’Malley’s videotaped demonstration (briefing room video at 6:49 minutes) illustrates O’Malley’s recollection of the distance between Heenan and Heimsness just prior to the shots.



Figure 2 O'Malley demo of separation

“Your physical positioning” is also particularly relevant to this situation. The following images from O’Malley’s briefing room demonstration clearly show Officer Heimsness crouched with bent knees and Heenan at a higher position, flailing his arms at Heimsness



Figure 3 5:09 minutes



Figure 4 5:11 minutes



Figure 5 5:45 minutes

Mr. O'Malley demonstrated an aggressive posture and aggressive movement at Officer Heimsness to get into this position. Officer Tieu, as a Training Officer and DAAT instructor, made particular note of this positioning, indicating that having the officer below and even somewhat underneath Heenan places the Officer a distinct tactical disadvantage, and further serves to re-enforce Heimsness' statement of his perception that he was not being very successful at keeping Heenan away from himself or his firearm (Heimsness PSIA interview November 29, page 12).

"Availability of Backup" is certainly a point to address in this circumstance. While Officer Heimsness was aware that another squad car had arrived on-scene, he has stated that he really had no idea where the other officer might be at the time of his physical altercation. From his PSIA interview (Heimsness PSIA interview November 29, page 13):

"No, I was in the middle of the fight with that guy and that was, I mean I remember looking and seeing there was nobody behind him, you know, when the decision comes to shoot, there was nobody behind him. I had, I didn't see anyone behind where he was. I still don't know where the person is. I don't know, they, you know, like I said I don't know who's coming to be the backup. For all I know they parked at the corner and they're just walking slowly. I don't know if they're running. I don't know where they're coming from so I have no idea where anybody is. All I know is I'm in the middle of a fight with this guy and he's trying to take the gun from me. My primary concern is this guy is gonna try to kill me if he gets this gun away from me and did I think where my back up was at that time. No, I didn't. I was thinking this guy is gonna kill me if I don't do something. He's trying to disarm me. "

I believe the above described "Special Circumstances" to be relevant to the current situation and further that they legitimately increase the threat perceived by Officer Heimsness.

Madison Police Department Policy regarding the use of deadly force (6-100) authorizes deadly force under the following circumstances:

DEADLY FORCE AUTHORIZED

The use of deadly force is only authorized when, under any of the following circumstances, an officer reasonably believes a lesser degree of force would be insufficient:

1. in the defense of another person who the officer has reasonable cause to believe is in imminent danger of death or great bodily harm;
2. in defense of oneself, when there is reasonable cause to believe one is in imminent danger of death or great bodily harm;
3. to effect the arrest or prevent the escape of a suspect who the officer has reasonable cause to believe has committed, or attempted to commit, a felony involving the use or threatened use of deadly force, when a high probability exists that the suspect, if not immediately apprehended, may cause death or great bodily harm;

4. to protect one's self or another from an animal which an officer reasonably believes may cause great bodily harm if not immediately controlled, or to end the suffering of an animal gravely injured or diseased after considering public view, safety, and other reasonable dispositions.

Officer Heimsness has articulated an explanation which is addressed under section 2. in "defense of oneself". It should also be noted that there was another party present, O'Malley, as well as another officer in the area, who could conceivably have been in danger should Heimsness' weapon be obtained.

From the State of Wisconsin Defense and Arrest Tactics Manual:

The word imminent means "about to happen". An imminent threat is an immediate threat. For a subject's threat to be considered imminent, it must meet three criteria:

- 1. Intent. The subject must indicate his or her intent to cause great bodily harm or death to you or someone else.**
- 2. Weapon. The subject must have a conventional or unconventional weapon capable of inflicting great bodily harm or death.**
- 3. Delivery System. The Subject must have a means of using the weapon to inflict harm.**

Regarding intent, Officer Heimsness has articulated his understanding that there would be no reason for someone to attempt to disarm him other than to shoot him. Heimsness also told me that when he made his decision to shoot, he believed the next thing to happen should he not take action would be that Heenan would get hold of his weapon (Heimsness PSIA interview Nov 29, page 13):

Q: Um, okay, you mention that kind of, that decision point. Do you remember a specific decision point? I, I'm gonna have to fire.

A: Yeah. Well that came at the point where I realize that I could no longer back up any faster than I was going, that he was still coming forward and had that advantage of moving forward obviously, you know, the human body is built to move fastest forward than backward so he was still coming at me, I was unable to keep him back any longer and he's coming very close, within grabbing the end of my gun 'cause I can see his hand, I can see my gun and I can see his fingers coming at it. That's when I decide he's going to get this gun like right now. If I don't act immediately, he's gonna get his hands on it and once his hands are on it, I'm, stand a chance of losing control of it and it's gonna be taken from me so at, that was the point where I decided I need to shoot. I can't let him because I also know that if he gets his hands on it, even if he doesn't get full control of it, if he gets his hands on it and pushes the slide back, the gun is not gonna work so I can't let him get his hands on it at all and he's about too. That's what I am seeing is happening. That's what I believe is about to happen. So then I push as hard as I can even though I'm still going backwards and still backing up with my left hand, left arm and hand which is not my, you know, dominant hand, I push as hard as I can as I'm going back against him to create some distance so I can get a two-handed grip to have a little better control in case I miss or whatever and now we're two hands on the

gun. I have the strongest grip I possibly can have on it. I square my body towards him and that's when I shoot. So that's, that's where that point came when I realized I can't keep him off me anymore and I'm about to lose any advantage I have.

1. Intent:

Heenan indicated his intent to Officer Heimsness by aggressing on him and attempting to grab his firearm. A reasonable officer does not have to wait for their weapon to actually be grabbed, or to be disarmed, before responding to stop the threat. There is no other reasonable inference for an officer to make regarding being disarmed other than for their weapon to be used against them. Heenan further displayed his intent by ignoring Heimsness' repeated clear verbal commands.

2. Weapon:

Heimsness' sidearm was present and accessible to Heenan.

3. Delivery System:

Should Heenan have obtained control or even partial control of the firearm, the weapon could have been fired at Heimsness. Both Kevin O'Malley and Officer Heimsness speak to the strength or force with which Heenan gripped them-Heimsness described this force as leading to pain in the fingers of his left hand. It is further apparent that Heenan was able to target both O'Malley and Heimsness to the point that he was in direct physical contact with them, and able to grab them.

Given these factors, I believe it is objectively reasonable for an officer to perceive an imminent deadly threat.

Preclusion:

The DAAT manual defines preclusion as follows(DAAT page 70):

Preclusion. Within the DAAT system, you may use deadly force to respond to behavior, but only if no other reasonable option is available. In other words, deadly force is a last resort. You must be able to articulate that, if possible, you attempted to escalate through other modes and tactics, and that all options except deadly force were closed. This concept is called preclusion. 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. If feasible, you should give a verbal warning before firing, but again, this is not always possible, and in some cases may not be desirable.

In these circumstances, Officer Heimsness attempted the following:

-He attempted to first control Heenan with his uniformed presence, by giving loud verbal orders, and by covering Heenan with his firearm.

-When Heenan aggressed on him, he continued to give orders to Heenan to "get back" and attempted to keep Heenan away from his firearm by trying to control him with his (Heimsness') left hand. Heimsness made an initial effort to try and maintain some distance between himself

and Heenan, but stopped backing up out of fear of falling. Heimsness did not consider turning and fleeing-he stated (MRF page 157):

PO Heimsness said he tried to disengage by pushing away but the suspect is still advancing on him. PO Heimsness said he knows that he can take some steps backwards but he knows there is going to be a curb or other things that can cause him to trip and fall and he cannot turn his back and run away because he knows that you never turn your back on a suspect. PO Heimsness said that even in a good situation like with field sobriety tests, you don't turn your back on a suspect because you never know what could happen. PO Heimsness said you certainly don't do it when someone is being aggressive.

Heimsness also did not consider re-holstering his firearm, fleeing, or using an active countermeasure (punching or kicking) (Heimsness PSIA interview Nov 29, page 15):

Q: And we get that. So within this, this physical confrontation, you've got your gun out. You're, you're in this kind of fighting with your left, left hand and arm and his right hand and arm. During this timeframe, did you, do you remember having any thoughts about other, other force options, any kind of active countermeasure, anything like that?

A: No. There really wasn't, there really wasn't any time to, to do that, to, to, to be effective with another kind of countermeasure, I would have really had to have holstered and I wasn't willing to try to holster because if I miss the holster, if I drop it, I drop the gun if I'm not able to holster in time. I don't want to, I don't really want to use an active countermeasure on somebody with something in my hand especially your gun, do you lose it, it's, it just wasn't appropriate. So no I didn't and the time, the time was just not there. It was, it was so quick and so immediate that the physical confrontation was on and, and I'm backing up. The idea of, of holstering and then trying to use the Taser is completely inappropriate because I think the guy is trying to disarm me. It's a deadly force encounter. I'm not gonna transition away from my most effective tool in a deadly force encounter and go to a lower option. It just wasn't, I just don't believe it would have been effective at that point so I, no I didn't.

The 1989 United States Supreme Court Case *Graham v. Connor* states:

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. See *Terry v. Ohio, supra*, at [392 U. S. 20-22](#). The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, *Hill v. California*, [401 U. S. 797](#) (1971), nor by the mistaken execution of a valid search warrant on the wrong premises, *Maryland v. Garrison*, [480 U. S. 79](#) (1987). With respect to a claim of excessive force, the same standard of reasonableness at the moment applies:... The calculus of reasonableness must embody

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allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.

Preclusion in this circumstance, then, does not mean that Officer Heimsness had to progress through every intervening level of force, either physically or mentally, but it is important to acknowledge that his initial use-of-force attempts (uniformed presence, verbal commands, empty hand control with his left hand, attempting to create distance) were unsuccessful. It is my opinion that in this circumstance with Officer Heimsness and Paul Heenan, that at the time Officer Heimsness made his decision to deploy deadly force, lesser use of force options were unavailable to Officer Heimsness.

To evaluate this deadly force decision, finally, the standard of objective reasonableness again requires a review of the following factors:

- Is the suspect an immediate threat to officers and/or others?
- Is the suspect actively resisting seizure?
- Are the circumstances tense, uncertain, and/or rapidly evolving?
- What is the severity of crime(s) at issue?
- Is the suspect attempting to evade seizure by flight?

Response:

It is clear from the above discussion that Heenan was an immediate threat to Officer Heimsness by virtue of his attempts to grab Heimsness weapon. It is further clear that had Heenan obtained Heimsness' firearm, he would also have been a threat to Mr. O'Malley and Officer Troumbly.

Paul Heenan was actively resisting Officer Heimsness' verbal orders and attempts to physically control him.

These circumstances are very clearly tense, uncertain, and rapidly evolving. The situation changed from a struggle with a homeowner and a potential burglar to a physical confrontation with an armed officer very quickly. It is further important to again note that from the time of Officer Heimsness' initial radio call of the "fight" to the shots being fired is only 15 seconds. A great deal occurs in that period of time and certainly confirms how quickly this situation unfolded.

The underlying crime at issue is a Burglary, a felony, and also a possible assault on the homeowner. The incident continues with an attempt to disarm a uniformed police officer, a class H felony, as well a potential assault on the officer.

The suspect in this case, Heenan, was not attempting to evade seizure by flight, but did, in fact, initiate a physical struggle with both O'Malley, and Officer Heimsness, which is more aggressive than fleeing the area.

Based on the above response, I find that Officer Heimsness' use of deadly force in this circumstance was objectively reasonable.

Target requirements:

Wisconsin DOJ Firearms and DAAT Training Guides for Law Enforcement Officers states (page 70):

If you have determined that you face a threat that meets the requirements to permit deadly-force response, and you have decided to shoot, you must fulfill three target requirements:

***Target acquisition.* Target acquisition means simply that you have acquired an actual target to shoot at. You cannot fire blindly in the direction of a sound, for example, because you may endanger others. If someone has shot at you from an apartment building, you cannot return fire until you have a specific target to aim at.**

***Target identification.* Target identification means that you have identified your target as the source of the imminent threat. To continue the previous example, just because you see someone at a window in that apartment building, you cannot shoot until you verify that the individual you see is the person who shot (or someone else who is about to shoot at you).**

***Target isolation.* 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.**

Officer Heimsness was able to achieve target acquisition, as well as target identification by virtue of the fact that Paul Heenan was directly in front of him, grabbing at Heimsness' firearm. It further appears that Heimsness believed he had target isolation, as he could see no one other than Heenan in his line of fire. I note that Heimsness also explained to me that one of the reasons he did not fire from his single-hand position while struggling with Heenan was because he did not want to fire blindly, and wanted to make sure he was in a position to hit his target. As it turns out, Officer Troumbly was approaching from the north, and could have potentially been in Heimsness' line of fire. I know, from viewing the scene, that it would have been very difficult for Heimsness to see Troumbly as she was running through an area (the center of the block) with significantly less light than the area Heimsness found himself in. I further note from viewing the case photographs that Troumbly was wearing her navy blue uniform with long sleeves and a black watchcap. I find it reasonable that Heimsness would believe he had target isolation when he fired, and in fact, it is clear from Troumbly's statement that Heenan was between herself (Troumbly) and Heimsness-she could not see Heimsness' firearm or the flash when he fired. I believe Officer Heimsness has met the target requirements regarding this use of deadly force.

The final component in the use-of-force evaluation involves training-The DAAT manual (page 3) states that any use of force on the part of officers must fall into one of the following categories:

- 1. A trained technique**
- 2. A dynamic application of a trained technique (*i.e.*, not quite the classroom model, but as close to it as possible under the circumstances)**
- 3. A technique not trained, but justifiable under the circumstances**

It is readily apparent that Officer Heimsness has applied a trained technique in this circumstance. In fact, he utilized his most basic shooting training, that is, a strong 2-handed platform, square to the target when firing his department approved firearm.

Use of force summary:

In summary, I have determined that Officer Heimsness' use of deadly force in this circumstance meets the objective reasonableness standards set forth in the State of Wisconsin DOJ Defensive and Arrest Tactics manual for Law Enforcement Officers (Published March 2007). These standards incorporate the relevant case law established by the US Supreme Court in *Graham v. Conner* and *Tennessee v. Garner*.

Conclusion

The first policy to examine in the context of this investigation is Madison Police Department Policy 4-500 POLICE WEAPONRY which states, in part,

DRAWING THE HANDGUN AND CONFRONTING SUSPECTS

1. A handgun may be removed from its holster in the performance of duty under the following circumstances and only with the finger outside of the trigger guard:

- a. When an officer reasonably believes that the potential for the authorized use of deadly force may exist.**
- b. When it is necessary to secure in a safe place or check on the serviceability of the weapon.**
- c. At an approved range.**

It is apparent from the statements made by Officer Heimsness, that he drew his firearm upon seeing a potential burglary suspect in a physical confrontation with a homeowner. It is further apparent from my discussions with Officer Tieu that confronting potential burglary suspects would be considered a high-risk and dangerous activity for Officers, and that officers would be trained to address such suspects at gunpoint. I believe Officer Heimsness' conduct of drawing his firearm, covering the suspect, and issuing verbal commands is in compliance with policy 4-500.

This point is important, as the fact that Heimsness had his firearm in hand when Heenan engaged him physically limited, to a large extent, how Heimsness was able to respond to Heenan's aggression and attempts to grab his firearm. I find it reasonable that Heimsness would not attempt to re-holster his weapon, and would be unwilling to back up blindly.

Madison Police Department Policy 6-100 Deadly Force Authorized states:

DEADLY FORCE AUTHORIZED


The use of deadly force is only authorized when, under any of the following circumstances, an officer reasonably believes a lesser degree of force would be insufficient:

- 1. in the defense of another person who the officer has reasonable cause to believe is in imminent danger of death or great bodily harm;**
- 2. in defense of oneself, when there is reasonable cause to believe one is in imminent danger of death or great bodily harm;**
- 3. to effect the arrest or prevent the escape of a suspect who the officer has reasonable cause to believe has committed, or attempted to commit, a felony involving the use or threatened use of deadly force, when a high probability exists that the suspect, if not immediately apprehended, may cause death or great bodily harm;**
- 4. to protect one's self or another from an animal which an officer reasonably believes may cause great bodily harm if not immediately controlled, or to end the suffering of an animal gravely injured or diseased after considering public view, safety, and other reasonable dispositions.**

My use-of-force evaluation has found that a reasonable officer would be justified in the use of deadly force in this circumstance. Officer Heimsness' belief that he was in imminent danger of death or great bodily harm is deemed to be objectively reasonable. Officer Heimsness belief that lesser degrees of force were not viable in the moment and under the totality of the circumstances (see the above discussion regarding preclusion and special circumstances) is also deemed objectively reasonable. The decision of Officer Heimsness to use deadly force was reasonable and within Madison Police Department Policy and State of Wisconsin use-of-force standards.

Findings

4-500 Police Weaponry.....EXONERATED
6-100 Deadly Force Authorized.....EXONERATED



Dan Olivas, Lieutenant of Police
Professional Standards and Internal Affairs

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A Training Guide For Law Enforcement Officers

Wisconsin Department of Justice

Law Enforcement Standards Board

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