

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

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THE ESTATE OF TONY ROBINSON, JR.,  
Ex. Rel. Personal Representative  
ANDREA IRWIN,

No. 15-CV-502

Plaintiff,

Hon. Judge Peterson, Presiding

v.

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

Defendants.

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**PLAINTIFF'S PROPOSED FINDINGS OF FACT**

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Plaintiff, by and through her attorneys, Loevy & Loevy, submits the following  
Proposed Findings of Fact in Response to Defendants' Motions For Summary

Judgment:<sup>1</sup>

*Arrival On-Scene*

1. Defendant Officer Matt Kenny was dispatched to a "check person" at 1125  
Williamson Street. By the time Kenny arrived had already been informed by dispatch  
that Tony Robinson ("Robinson") was unarmed. (Dkt. 39.1, Ex. 6 to Christian Depo.  
(Channel 1 Radio Transmissions; Dkt. 39.1, at DCI-533.) ("No weapons seen").)

2. Kenny had also been told that Robinson had returned to the upstairs  
apartment at that address, and that the initial 911 caller had left that address, a fact

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<sup>1</sup> Both the City of Madison and Officer Kenny have moved for summary judgment on the  
basis that Plaintiff's Fourth Amendment claim should not be submitted to a jury. Plaintiff  
response to the City's motion will largely overlap with the response to Defendant Kenny's  
motion, so some of the *Monell* issues are included here for the purpose of brevity in  
subsequent p leadings.

he specifically confirmed before getting out of his squad car. (Dkt. 39.1, Channel 1 Radio Transmissions, Ex. 6 to Christian Depo.)

3. Kenny was also aware that other officers had also been dispatched to the scene and were on their way. (Dkt. 39.1, Ex. 6 to Christian Depo., Channel 1 Radio Transmissions; Dkt. 39.1, at DCI-533; Dkt. 40, Kenny Depo. at 293, 296-97; Dkt. 88, Waller Report at 7.)

4. As Kenny arrived at the scene, a white male named TJ Terrien flagged him down and informed him that Tony Robinson had gone into the door to the upstairs residence at 1125 Williamson Street. (Dkt. 40, Kenny Depo. at 264-66, 272; Dkt. 40.1, Ex. 160 to Kenny Depo. at DCI-178; Dkt. 36, Terrien Depo. at 31-32, 44-45.)

5. The white male did not indicate that Robinson had followed anyone else into the apartment, or provide any other indication that there might be someone else in the apartment. (Dkt. 36, Terrien Depo. at 44-45; Dkt. 40, Kenny Depo. at 272, 274; Exhibit 160 to Kenny Depo. at DCI-178.)

6. Kenny parked his police vehicle in the driveway of 1125 Williamson Street, with the dashcam video looking onto the front porch and entrance leading into the stairwell to apartment #2. (Dkt. 126.5, Flessert Audio-Video Synch; Dkt. 126.6, McKay Audio-Video Synch.)

7. When Kenny exited his vehicle he turned off the emergency lights, knowing that this would cause his body microphone to turn off. In fact, in direct violation of Madison Police Department (“MPD”) policy, Kenny was not wearing his body microphone when he exited the vehicle. (Dkt. 40, Kenny Depo. at 286-87, 288-289 (“Q: Madison policy is you're supposed to have your microphone on; correct? A: You're

supposed to have it on you. Yes. Q: And you were supposed to be wearing your microphone when you arrived on scene? A: I most definitely was supposed to be wearing it. Yes. Q: And you weren't, on that occasion? A: I was not.”); Dkt. 106, Nelson Depo. at 173-74; Dkt. 88, Waller Report at 5.).

8. As depicted on the dashcam video from his vehicle, Kenny then walked around the outside of the residence before stepping up to the porch entrance to the stairwell. Kenny moved methodically and did not behave in any way to indicate that he saw or heard something that made him think someone was being injured or harmed in the upstairs apartment and required immediate help. (Dkt. 126.5, Flessert Audio-Video Synch; Dkt. 126.6, McKay Audio-Video Synch.)

9. Kenny then radioed that he was going to enter the stairwell to the upstairs residence, and drew his gun as he began to enter. (Dkt. 126.5, Flessert Audio-Video Synch; Dkt. 126.6, McKay Audio-Video Synch; Dkt. 39.1, Ex. 6 to Christian Depo. (Channel 1 Radio Transmissions), Dkt. 39.1, at DCI-533.)

10. He did not communicate over the radio that he saw or heard any signs or sounds of a disturbance, or that he felt there was someone upstairs who was being assaulted and needed immediate help. (Dkt. 39.1, Ex. 6 to Christian Depo. (Channel 1 Radio Transmissions), Dkt. 39.1, at DCI-533.)

11. In fact, there was no one upstairs other than Tony Robinson. (Dkt. 40, Kenny Depo. at 356; Dkt. 33, Gary Depo. at 97.)

12. Kenny admits that he only heard one voice, that he never heard anything that he perceived to be the sound of a second voice, that he never heard anyone in distress or crying out for help, and that he did not hear anything that sounded like

someone strangling, punching or otherwise attacking someone else. (Dkt. 40, Kenny Depo. at 309-310, 316-320, 322-325.)

13. Kathleen Bufton, the downstairs resident at 1125 Williamson Street, was in her kitchen in the downstairs apartment all evening and did not hear anything that sounded like fighting coming from upstairs for at about five minutes before she heard the gunshots. (Dkt. 126.8, DCI-196) (Bufton reported hearing person “possibly fighting with another person *at least five minutes before* [she] heard the gunshots”) (emphasis added); Dkt. 31, Bufton Depo. at 17-18; Dkt. 106, Nelson Depo. at 240-241.)

*Decision Not to Wait for Backup*

14. As Kenny made his way to 1125 Williamston Street, given the dispatch, Kenny believed Robinson may be suffering from a serious medical crises that people in the law enforcement community call “excited delirium.” (Dkt. 40, Kenny Depo. at 321-22; Dkt. 88, Waller Report at 8-9.)

15. Kenny was trained that, as a general rule, officers should try to wait for backup. He was also trained that, especially in cases where they suspect someone is suffering from excited delirium, they should wait for backup rather than going in alone. Kenny was also trained that tasers are the preferred use of force device for addressing individuals suspected of excited delirium. (Dkt. 40, Kenny Depo. at 332; Dkt. 88, Waller Report at 8-9.)

16. In contravention of his training and of established police standards, Kenny did not wait for backup before entering the stairwell. He knew backup was coming quickly and close behind, but he did not check how close they were. (Dkt. 39.1,

Ex. 6 to Christian Depo. (Channel 1 Radio Transmissions), Dkt. 39.1, at DCI-533; Dkt. 40, Kenny Depo. at 293, 296-97; Dkt. 88, Waller Report at 7, 8-9.)

17. In fact, as Kenny entered the stairwell, backup was already there. Sergeant Gary had pulled up in front of the house before Kenny entered the stairwell with his gun drawn, and, just after Kenny entered, Gary announced over the radio that he was at the house (Dkt. 48.4, Report of Nelson at City-8437-8438; Dkt. 40, Kenny Depo. at 300; Dkt. 39.1, Ex. 6 to Christian Depo. (Channel 1 Radio Transmissions))

18. According to Kenny, if he had waited for backup, he could have gone in with his taser instead of his handgun. (Dkt. 40, Kenny Depo. at 325-26.)

*Actions in the Stairwell*

19. Kenny claims that he entered the stairwell without backup because he felt someone upstairs was being assaulted and needed immediate help, and so he did not feel he had even a few seconds to wait for backup or find out how close backup was. (Dkt. 40, Kenny Depo. at 297-300.)

20. Yet, Kenny's actions are entirely inconsistent with any claim that he felt someone upstairs needed his immediate help. On the dashcam video he shows no sign of moving quickly or hastily before entering the stairwell. And after entering the stairwell, he acted inconsistently with police training about what to do under the circumstances, which is to either move quickly up the stairs to immediately assist the potential victim, or immediately announce himself as a Madison Police Officer to distract attention away from the potential victim to himself. (Dkt. 126.5, Flessert Audio-Video Synch; Dkt. 126.6, McKay Audio-Video Synch; Dkt. 88, Waller Report at 5-7; Dkt. 29, Waller Depo. at 44-45.)

21. Kenny did not immediately announce his office, and in fact he never announced himself as a police officer at any point before the shooting. Indeed, no other officers or witnesses at the scene heard Officer Kenny announce himself. (See Dkt. 31, Bufton Depo. at 12-13, 18 (“I never, ever heard anybody say the police were there.”), 26; Dkt. 126.8, DCI-195-199 (Bufton does not report hearing “Madison Police” before shots were fired); Response to Kenny’s PFOF ¶ 89 (Bufton did not have any indication police were there until after the shots were fired); Dkt. 126.8, DCI-200-202 (other person downstairs, Greengrass, does not report hearing “Madison police” before shots were fired); Dkt. 30, Greengrass Depo. at 11-12, 23; Dkt. 39, Christian Depo. at 119-120; Dkt. 33, Gary Depo. at 84; *see also* Dkt. 126.5, Flessert Audio-Video Synch; Dkt. 126.6, McKay Audio-Video Synch, (Gary’s microphone picks up sound of footsteps in stairwell, but nothing said beforehand).

22. Kenny also did not move up the stairs quickly to get inside to help someone he thought was in danger. Instead, he spent nearly 20 seconds in the stairwell—far longer than it takes to get up a set of 11 steps—with his weapon in a ready-firing position, without saying a word. (Dkt. 40, Kenny Depo. at 39, 358; Dkt. 48.4, Report of Nelson at City-8438; Dkt. 66, Krenz Report at 13; Dkt. 88, Waller Report at 4-7.)

23. After the nearly 20 seconds in the stairwell, Kenny was still at the base of the stairs just inside the doorway when he began shooting. (Dkt. 113.3, DOJ Synch Stills; Dkt. 113.4, McKay Synch Stills; Dkt. 90, Marso Report at 4-5; Dkt. 37, Marso Depo. at 130-32; Dkt. 93, Arden Report at 5-6; Dkt. 119, Tranchida Depo. at 28.)

24. Without any knowledge that Kenny was at the base of the stairs, Tony Robinson entered the stairwell from the upstairs apartment and started coming down. (See ¶ 20, *supra*.)

25. Robinson did not say anything; he just started going down the stairs. (Dkt. 40, Kenny Depo. at 62-65; *cf.* Dkt. 31, Bufton Dep. at 26; Dkt. 126.8, DCI-195-199 (Bufton does not report hearing Robinson say anything); Dkt. 126.8, DCI-200-202 (other person downstairs, Greengrass, does not report hearing Robinson say anything); Dkt. 30, Greengrass Depo. at 23; Dkt. 33, Gary Depo. at 84; Dkt. 126.5, Flessert Audio-Video Synch; Dkt. 126.6, McKay Audio-Video Synch, (Gary's microphone picks up sound of footsteps in stairwell, but nothing said beforehand).)

26. As Robinson was coming down the stairs, Kenny fired three shots at him in rapid succession from the base of the stairs, aiming his weapon up at Tony Robinson. (Dkt. 126.5, Flessert Audio-Video Synch; Dkt. 126.6, McKay Audio-Video Synch; Dkt. 113.3, DOJ Synch Stills; Dkt. 113.4, McKay Synch Stills; Dkt. 90, Marso Report at 4-5; Dkt. 37, Marso Depo. at 130-32; Dkt. 93, Arden Report at 5-6.)

27. Robinson was approximately halfway down the stairs, near the location of blood spatter found on the wall halfway down the stairwell, when the first shot struck him. (Dkt. 90, Marso Report at 4-5; Dkt. 37, Marso Depo. at 80, 133-34; Dkt. 106, Nelson Depo. at 73-74, 279-280; Dkt. 119, Tranchida Depo. at 28; *see also* Dkt. 40, Kenny Dep. at 21-23 (testifying that Kenny does not know how he got to the bottom of the stairs).)

28. Kenny hit Robinson with three non-fatal shots, to the right hand, the left shoulder and the chin. The wounds in those three locations had no evidence of stippling

(aka powder tattooing), indicating that they were fired from a distance of greater than 3-4 feet. (Dkt. 90, Marso Report at 4-6; Dkt. 37, Marso Depo. at 96, 144; Dkt. 93, Arden Report at 2-3, 4-5; Dkt. 96, Di Maio Depo. at 78-79 (lack of stippling indicates distance of greater than 3-4 feet).)

29. After the first shot was fired, Robinson began falling down the stairs. (Dkt. 90, Marso Report at 5; Dkt. 119, Tranchida Depo. at 33-34; Dkt. 96, Di Maio Depo. at 185-87 (Q: One likely scenario to explain the shots in your mind is that at some point during the first three shots Tony Robinson started falling down the stairs, correct? A: Yeah, falling forward. . . . Q: Another thing you considered is that Tony Robinson did, in fact, fall down the stairs to get from the top of the stairs to bottom of the stairs when the next set of shots were fired, correct? A: Right. Q: Okay. In fact that is -- that's your best sense of what probably happened. A: Right.”); Dkt. 40, Kenny Depo. at 32-33 (possible Robinson fell down stairs).)

30. As Robinson fell down the stairs and Kenny continued firing the rest of the first burst of three shots, Kenny was backing out of the doorway from the base of the stairs to the front porch. (Dkt. 113.3, DOJ Synch Stills; Dkt. 113.4, McKay Synch Stills; Dkt. 126.5, Flessert Audio-Video Synch; Dkt. 126.6, McKay Audio-Video Synch.)

31. At the time of the first shot, Kenny was in the stairwell, just inside the doorway and out of the view of his dashcam video. By the second shot a split second later, Kenny's body can be seen emerging out the doorway from the stairwell. (Dkt. 113.3, DOJ Synch Stills; Dkt. 113.4, McKay Synch Stills.)

32. Robinson fell down the stairs and landed at Kenny's feet at the base of the stairs before shots 4-7 were fired. Robinson was on the ground, on his butt with his legs



laid out in front of him, with his upper body partly against the stairs and partly upright. He was not aggressing or attacking Officer Kenny in any fashion. (Dkt. 113.3, DOJ Synch Stills; Dkt. 113.4, McKay Synch Stills; Dkt. 126.5, Flessert Audio-Video Synch; Dkt. 126.6, McKay Audio-Video Synch; Dkt. 40, Kenny Depo. at 33-35, 109-115; Dkt. 90, Marso Report at 3, 5; Dkt. 37, Marso Depo. at 82-83; Dkt. 66, Krenz Report at 36 (Defendants' depiction of Robinson's positioning on the seventh shot).)

33. As depicted in the video, as Robinson landed, Kenny was not falling but instead, lunged his upper body forward and kicked one leg back as he attempted to avoid Robinson's falling body. Kenny's actions were controlled and not failing as he then started to back out of the stairwell to the outside porch. (Dkt. 113.3, DOJ Synch Stills; Dkt. 113.4, McKay Synch Stills; Dkt. 126.5, Flessert Audio-Video Synch; Dkt. 126.6, McKay Audio-Video Synch; Dkt. 40, Kenny Depo. at 116.)

34. With Robinson lying on the ground at the base of the stairs and Kenny lunging forward over him, Kenny fired three more shots at Tony Robinson in rapid succession, aiming for "high center mass," *i.e.*, Robinson's upper torso or chest. (Dkt. 40, Kenny Depo. at 109-10, 112-14; Dkt. 48.4, Report of Nelson at City-8438 ("Off. Kenny appears to lean forward to catch himself, his upper body is obscured by the doorway and he appears to fire a round just as he is backing out of the doorway.").)

35. All three shots were fired with Kenny's upper body and gun in the stairwell at the base of the stairs, and with Tony Robinson in the stairwell at the base of the stairs. The distance from Kenny's gun to Robinson during the fourth, fifth and sixth shots was extremely close, from contact to well within 3-4 feet. (Dkt. 113.3, DOJ Synch Stills; Dkt. 113.4, McKay Synch Stills; Dkt. 126.5, Flessert Audio-Video Synch;

Dkt. 126.6, McKay Audio-Video Synch; Dkt. 66, Krenz Report at 13 (entire depth of stair landing approximately three feet); Dkt. 40, Kenny Depo. at 116-17; Dkt. 90, Marso Report at 5-6; Dkt. 93, Arden Report at 4-5; Dkt. 96, Di Maio Depo. at 212; Dkt. 48.4, Report of Nelson at City-8438 (“It appear as though the suspect is in the same physical vicinity that Off. Kenny is since his foot is in the same location as Off. Kenny’s foot.”).)

36. Kenny hit his mark on all three shots, hitting Robinson with three fatal shots to the chest that all went through Robinson’s heart and other vital organs. (Dkt. 93, Arden Report at 2-3,4-5; Dkt. 65, Di Maio Report at 3-5; Dkt. 96, Di Maio Depo. at 131-32.)

37. All three of the wounds to the chest showed evidence of stippling, indicating that they were fired from close range, inside of approximately 3-4 feet. (Dkt. 93, Arden Report at 2-3,4-5; Dkt. 90, Marso Report at 5-6; Dkt. 65, Di Maio Report at 3-5; Dkt. 96, Di Maio Depo. at 78-79.)

38. One of the wounds to the chest showed evidence of searing, indicating that it was a contact wound or near contact wound. (Dkt. 93, Arden Report at 2-3,4-5; Dkt. 65, Di Maio Report at 3-5; Dkt. 96, Di Maio Depo. at 78-79.)

39. After the fourth through sixth shots, Kenny continued to back out of the stairwell and was now completely outside on the front porch. (Dkt. 113.3, DOJ Synch Stills; Dkt. 113.4, McKay Synch Stills; Dkt. 126.5, Flessert Audio-Video Synch; Dkt. 126.6, McKay Audio-Video Synch.)

40. As he did this, he fired a seventh and final shot. Robinson was still lying on the ground at the base of the stairs, with his feet out in front of him. (Dkt. 113.3, DOJ Synch Stills; Dkt. 113.4, McKay Synch Stills; Dkt. 126.5, Flessert Audio-Video

Synch; Dkt. 126.6, McKay Audio-Video Synch; Dkt. 40, Kenny Depo. at 109-117; Dkt. 90, Marso Report at 5; Dkt. 66, Krenz Report at 36.)

41. The dashcam video shows that as the seventh shot is fired, the muzzle of Kenny's gun is just outside the doorway at the time of the seventh shot, indicating that the distance from the muzzle of Kenny's gun to Robinson's body is within 3-4 feet. Robinson's feet can be seen lying on the ground, toes pointed up. (Dkt. 126.5, Flessert Audio-Video Synch; Dkt. 126.6, McKay Audio-Video Synch; Dkt. 113.3, DOJ Synch Stills; Dkt. 113.4, McKay Synch Stills; Dkt. 40, Kenny Depo. at 33-35, 116-17.)

42. Kenny's seventh shot also hit its high center mass target, causing a fatal wound through Robinson's heart. The wound on the final shot to the chest also shows evidence of stippling, indicating that it was fired from within 3-4 feet. (Dkt. 93, Arden Report at 2-3,4-5; Dkt. 90, Marso Report at 5-6; Dkt. 65, Di Maio Report at 3-5; Dkt. 96, Di Maio Depo. at 78-79; Dkt. 40, Kenny Depo. at 112-14.)

43. After backing all the way out the door and off the porch, Kenny makes his first statement since the time he entered the stairwell: "Stop right there! Don't move!" (Dkt. 48.4, Report of Nelson at City-8439; Dkt. 40, Kenny Depo. at 62, 64.)

#### *Interpretation of the Forensic Evidence*

##### Gunshot Wounds

44. Forensic pathologists indicate that if there is a muzzle imprint, or searing, on a gunshot wound, that indicates that it was a contact wound. This means that it was fired from a distance of less than half an inch from muzzle to body. (Dkt. 93, Arden Report at 5; Dkt. 65, Di Maio Report at 5; Dkt. 96, Di Maio Depo. at 78.)

45. If there is soot and stippling (but not searing), that indicates the shot was fired from close range. This means it was fired from a distance of greater than half an inch, but less than approximately 6-12 inches. (Dkt. 93, Arden Report at 5.)

46. If there is stippling but no soot or searing, that indicates the shot was fired from intermediate range. This means it was fired from a distance of greater than 6-12 inches, but less than three to four feet. (Dkt. 93, Arden Report at 5; Dkt. 65, Di Maio Report at 3-5; Dkt. 96, Di Maio Depo. at 78-79; Dkt. 37, Marso Depo. at 110.)

47. If there is no stippling on a gunshot wound, that indicates that it was a distant shot. This means it was fired from a distance of greater than three to four feet from muzzle to body. (Dkt. 93, Arden Report at 5; Dkt. 65, Di Maio Report at 3-5; Dkt. 96, Di Maio Depo. at 78-79; Dkt. 37, Marso Depo. at 110.)

48. The gunshot wounds are identified as A-G by the Medical Examiner, Dr. Tranchida and Plaintiff's expert Dr. Jonathan Arden; Defendants' expert, Dr. Di Maio, identifies them by number. So, gunshot wound A is the same as what Dr. Di Maio calls gunshot wound #1, and so on. (Dkt. 65, Di Maio Report at 3-5; Dkt. 93, Arden Report at 2.)

49. Gunshot wound A entered the lower lip and took a sharply downward trajectory out the back of the chin and re-entered Robinson's right upper arm. There is no evidence of stippling, indicating that it was a distant shot. (Dkt. 93, Arden Report at 2-5; Dkt. 65, Di Maio Report at 3-5.)

50. Gunshot wound B entered near the left shoulder and has a virtually horizontal trajectory. There is no evidence of stippling, indicating that it was a distant shot. (Dkt. 93, Arden Report at 2-5; Dkt. 65, Di Maio Report at 3-5.)

51. Gunshot wound C entered the upper chest and had a downward trajectory through the heart and lungs. There is stippling but no searing or soot, indicating that the shot was fired from intermediate range. (Dkt. 93, Arden Report at 2-5; Dkt. 65, Di Maio Report at 3-5.)

52. Gunshot wound D entered in the upper chest at the jugular notch and had a significant downward trajectory through the heart and lungs. There is stippling but no searing or soot, indicating that the shot was fired from intermediate range. (Dkt. 93, Arden Report at 2-5; Dkt. 65, Di Maio Report at 3-5.)

53. Gunshot wound E entered in the upper chest and had a severe downward trajectory through the heart and lungs. There is stippling and searing, indicating a contact wound. (Dkt. 93, Arden Report at 2-5; Dkt. 65, Di Maio Report at 3-5.)

54. Gunshot wound F entered in the upper chest at the jugular notch and had a downward trajectory through the heart and lungs. There is stippling but no searing or soot, indicating that the shot was fired from intermediate range. (Dkt. 93, Arden Report at 2-5; Dkt. 65, Di Maio Report at 3-5.)

55. Gunshot wound G entered the back of the right index finger and based on its location has no associated trajectory. There is no evidence of stippling, indicating that it was a distant shot. (Dkt. 93, Arden Report at 2-5; Dkt. 65, Di Maio Report at 3-5.)

56. Gunshot wounds A, B and G were all distant shots, *i.e.*, fired from greater than three to four feet from muzzle to body. They are also all non-fatal shots. (Dkt. 93, Arden Report at 2-5; Dkt. 65, Di Maio Report at 3-5; Dkt. 96, Di Maio Depo. at 131-32.)

57. Gunshot wounds B, C, D and E are all fatal shots, having gone through the heart and other vital organs; they were fired from intermediate range to contact, *i.e.*, from less than 3-4 feet; and they all have downward trajectories. (Dkt. 93, Arden Report at 2-5; Dkt. 65, Di Maio Report at 3-5; Dkt. 96, Di Maio Depo. at 78-79, 131-32.)

58. This grouping of wound locations and wound types syncs up with the two groupings of shots. There were three shots fired in rapid succession initially while Robinson was coming down the stairwell, and then four shots fired after Robinson came to rest on the ground at the base of the stairs. (Dkt. 90, Marso Report at 5-6, Dkt. 37, Marso Depo. at 86-87.)

59. Gunshot wounds A, B and G were most likely the first three shots, fired from the base of the stairs at Robinson as he was approximately halfway down the stairs and falling. (Dkt. 90, Marso Report 4-6; *see* ¶¶ 25, 26, *su pra*.)

60. Gunshot wounds A, B and G all contain no evidence of stippling, indicating that they were fired from distance, *i.e.*, from the base of the stairs at Robinson halfway up the stairwell), and therefore were not fired during any close range attack or aggression. (*See* ¶¶ 48, 49, 54, 55, *su pra*; Dkt. 93, Arden Report at 4-5; Dkt. 90, Marso Report at 4-6; Dkt. 65, Di Maio Report at 9 (if physical contact as Kenny claims, would expect to see stippling).)

61. In addition, all three shots missed the high center mass target that Kenny was aiming for, making it more likely that they were fired from greater distance, and with the shooter and/or the target in motion. (Dkt. 90, Marso Report at 5; Dkt. 40, Kenny Depo. at 107-108 (both moving during first three shots).)

62. The downward trajectory of gunshot wound A is explained by the fact that Robinson was falling during some or all of the first three shots, as the trajectory of gunshot wound A is consistent with Robinson falling down the stairs. (Dkt. 93, Arden Report at 4, 5; Dkt. 90, Marso Report at 5; Dkt. 119, Tranchida Depo. at 33-34; Dkt. 96, Di Maio Depo. at 185-87; Dkt. 40, Kenny Depo. at 32-33.)

63. The remaining shots, gunshot wounds B, C, D and E are most likely the fourth through seventh shots. As depicted in the dashcam video and the still photos of the positioning during each of the shots, both Kenny and Robinson were at the base of the stairs during the fourth through seventh shots, with Robinson laying at the base of the stairs with Kenny leaning forward over him. The distance from Kenny's muzzle to Robinson's body was between contact to no more than a few feet. As a result, stippling would be expected on all of these shots, with searing likely on at least one shot. (See ¶¶ 31-34, 50-53, *supra*; Dkt. 90, Marso Report at 5-6; Dkt. 37, Marso Depo. at 104-108; Dkt. 93, Arden Report at 3 (regarding gunshot wound G creating the bullet track upstairs, indicating it was fired up the stairs); Dkt. 37, Marso Depo. at 114-15; Dkt. 48.4, Report of Nelson at City-8438 ("It appear as though the suspect is in the same physical vicinity that Off. Kenny is since his foot is in the same location as Off. Kenny's foot.").)

64. Indeed, gunshot wounds C, D, E and F all contain stippling, and E contains searing. (See ¶¶ 50-53, 56, *supra*.)

65. Given that Kenny begins backing up during the fourth through sixth shots, gunshot wound E is most likely the fourth shot, fired in contact with Robinson's body as he was lying at the base of the stairs and Kenny was leaning over him. (Dkt.

37, Marso Depo. at 114-15; Dkt. 113.3, DOJ Synch Stills; Dkt. 113.4, McKay Synch Stills; Dkt. 126.5, Flessert Audio-Video Synch; Dkt. 126.6, McKay Audio-Video Synch; Dkt. 48.4, Report of Nelson at City-8438.)

66. In addition, gunshot wounds B, C, D and E all hit their high center mass target, and were fatal shots through the heart. The concentration and precision of the shots indicates that they were fired in succession, and that they were fired from close range, likely at a non-moving target. They are therefore most likely to have been the fourth through seventh shots, where Robinson is lying on the ground rather than coming down the stairs. (Dkt. 90, Marso Report at 5; Dkt. 37, Marso Depo. at 104-06; Dkt. 48.4, Report of Nelson at City-8438.)

67. The downward trajectories of shots B, C, D and E are also all consistent with being fired while Robinson is lying on the ground at the base of stairs, with Kenny above him. (Dkt. 90, Marso Report at 5-6; Dkt. 93, Arden Report at 4-5; Dkt. 96, Di Maio Depo. at 167-68; Dkt. 48.4, Report of Nelson at City-8438.)

#### Bullets

68. Two bullets traveled up the stairs and are indicative of shots fired up the stairs. (Dkt. 90, Marso Report at 4, 5-6; Dkt. 37, Marso Depo. at 76-77, 84-85.)

69. One of them created a bullet hole at the top of the stairs about four feet above the ground in the wall directly behind the stairwell. The bullet was found in a closet in the upstairs apartment on the other side of the wall. (Dkt. 90, Marso Report at 2.)

70. The other bullet caused an upward, angular track along the left wall (facing up) near the top of the stairs, and the bullet came to rest on a shoe near the top



of the stairs. The bullet track was a low-angle ricochet, indicating that it was fired from distance, and not fired from anywhere near the top of the stairs. (Dkt. 90, Marso Report at 2, 3, 4; Dkt. 37, Marso Depo. at 84-85, 118-20, 125-26.)

71. The presence of both bullets and resulting defects at or near the top of the stairs indicates shots fired from distance and up the stairs, consistent with Kenny shooting from the base of the stairs toward Robinson halfway up the stairs. (Dkt. 90, Marso Report at 2, 3, 4; Dkt. 37, Marso Depo. at 84-85, 118-20, 125-26.)

#### Blood and Bloodspatter

72. There is bloodspatter found on the left wall approximately halfway up the stairs, indicating that Robinson was impacted by a bullet very close to that location. (Dkt. 90, Marso Report at 4-5; Dkt. 37, Marso Depo. at 80, 133-34; Dkt. 106, Dkt. 106, Nelson Depo. at 73-74, 279-280; Dkt. 119, Tranchida Depo. at 28.)

73. Because no bloodspatter is found anywhere higher on the stairs, and the rest of the blood is spatter and pooling further down the stairs, the first shot most likely struck Robinson at this halfway point. (See ¶ 71, *supra*; Dkt. 96, Di Maio Depo. at 154-61 (identifying circumstances in which you would expect to see bloodspatter immediately at location of impact, many applicable here).)

74. If Robinson had been hit by three shots to the heart near the top of the stairs, as Kenny claims, there should have been bloodspatter at the top of the stairs, as well as blood and blood spatter all the way down the stairs. The absence of same refutes Kenny's version of events. (Dkt. 37, Marso Depo. at 144-46; Dkt. 96, Di Maio Depo. at 154-61)

#### Bullet Casings

75. Bullet casings travel to the right and rearward. There are no bullet casings anywhere on the stairwell; instead, all of the casings are found at the base of the stairs or outside. This evidence is consistent with Kenny having fired all of the shots from the base of the stairs. (Dkt. 90, Marso Report at 2, 4.)

*Officer Kenny's Story*

76. Within a few minutes of the shooting, Officer Kenny gave a "snapshot" statement to Sergeant Gary, intended as a short summary of the circumstances so that immediate investigative steps could be taken if needed. (Dkt. 102-2, Ex. 163 to Kenny Depo. at DCI 395; Dkt. 48.4, Report of Nelson at City-8440.)

77. In his "snapshot," Kenny claimed (1) that he heard more than one voice upstairs; (2) that Robison was yelling at him as he was swinging and punching; and (3) that Kenny did not draw his weapon until he was falling down after Robison had punched him. (Dkt. 102-2, Ex. 163 to Kenny Depo. at DCI 395; Dkt. 48.4, Report of Nelson at City-8440; Dkt. 88, Waller Report at 7, 11.)

78. Kenny later admitted that none of these things was true. He also admitted that his snapshot statement contained falsehoods. (Dkt. 40, Kenny Depo. at 356-60; Dkt. 88, Waller Report at 7, 11.)

79. Other than the snapshot, Officer Kenny was not required to give a formal or detailed statement to DCI or to the MPD after the shooting. Instead, he was given a few days to rest and then interviewed when he was ready to give a voluntary statement. (Dkt. 94, De La Rosa Depo. at 231-32; Dkt. 121, Fernandez Depo. at 198-200; Dkt. 40, Kenny Depo. at 162-63, 165-66, 181-82.)

80. Before giving his statement on March 9, 2015, Kenny was allowed to do a “walkthrough” of the scene, walking up and down the stairwell and assessing the scene with his attorney. He was then allowed to meet privately with his counsel before the interview began. And then, after being asked some general background questions, Officer Kenny and his attorney were given a private room to watch Kenny’s dashcam video and listen to Sergeant Gary’s body microphone audio as many times as they wanted. After more than an hour, they decided they were ready to continue the interview, at which point Kenny was asked – for the first time – about the details of the incident. (Dkt. 40, Kenny Depo. at 184-191, Dkt. 94.2, Ex. 71 to De La Rosa Depo., DCI Report of Kenny Interview, at DCI-171, 176-77; Dkt. 94.3, Ex. 72 to De La Rosa Depo., Transcript of DCI’s Kenny Interview, at DCI-846-48 (no questions about incident until after more than one hour break to allow Kenny and his attorneys to review the audio and video of the incident).)

81. With the benefit of time to review all of the evidence privately with counsel, Kenny’s story about what happened was shaped to fit the evidence he had been given access to before giving his statement. (*Id.*; Dkt. 40, Kenny Depo. at 184-91; Dkt. 98, Dennis Depo. at 106-07.)

82. For example, Kenny claims that Robinson came around the corner and hit him at the top of the stairs, and Kenny responded by firing the first burst of three shots at or near the top of the stairs. Kenny—whether deliberately or subconsciously—made up this story about an attack at the top of the stairs, because during the walkthrough he saw the dent in the right side of the wall near the top of the stairs. He therefore claimed that Robinson punched him in the left side of the head, causing the right side of

his head to hit the wall and cause the dent. By claiming that Robinson punched him near the dent at the top of the stairs, he could claim it as useful corroboration of an attack. (Dkt. 40, Kenny Depo. at 81-82, 184-91; Dkt. 98, Dennis Depo. at 106-07; Dkt. 106, Nelson Depo. at 88 (relying on dent as corroboration of Kenny's story), 202-203 (acknowledging that showing evidence before questioning can allow story to be shaped to fit evidence).)

83. But the dent is demonstrably unrelated to any punch or attack at the top of the stairs just before Kenny fires. The dent is approximately three feet above the stair below it, far too low for the 5'10" Kenny's head to hit his head at that level. There was also no drywall material found in the photos of Kenny's hair and scalp, or on his police jacket. (Dkt. 126-9.)

84. In addition, The audio-video synchronization that DCI created (and that Plaintiff's audio-visual expert confirmed is an accurate synchronization) clearly shows Officer Kenny exiting the stairwell to the front porch at the time of shot two, a split second after the first shot is fired. So, Kenny was at the base of the stairs when he first encountered Robinson, and in fact never came into contact with Robinson at or near the top of the stairs. (See ¶ 22, *supra*; Dkt. 113.3, DOJ Synch Stills; Dkt. 113.4, McKay Synch Stills; Dkt. 91, McKay Report at 5-6; Dkt. 90, Marso Report at 4-5; Dkt. 37, Marso Depo. at 130-32; Dkt. 93, Arden Report at 5-6; Dkt. 119, Tranchida Depo. at 28.)

85. Kenny did not realize at the time he gave his statement to DCI that the audio-video synchronization would demonstrate, as he admits it does, that the shooting occurred at the bottom of the stairs. On Mach 9, 2015, when Kenny gave his statement, DCI had not yet created the audio-video synchronization. Kenny reviewed the audio

and video separately before giving his statement. (Dkt. 40, Kenny Depo. at 126-29 (admitting contradiction between his version of events and what synchronized audio-video shows); Dkt. 94.2, Ex. 71 to De La Rosa Depo. at DCI-176 (Gary audio and Kenny dashcam video as two different, unsynchronized files played separately); Dkt. 97, Engels Depo. at 234 (audio-video synchronization not created until after Kenny's March 9, 2015 DCI interview); Dkt. 99.2, Ex. 165 to Flessert Depo. at DCI-657 (same).)

86. Kenny's story about the shooting starting with a burst of three shots near the top of the stairs, followed by a second burst of three shots and a final shot at the base of the stairs, with Robinson in close range and aggressing toward him during all seven shots, is refuted by the forensic evidence. (Dkt. 90, Marso Report at 3-6; Dkt. 93, Arden Report at 3-6.)

87. Under Kenny's story, all seven gunshot wounds should have stippling because Robinson was very close to him and aggressing toward him at all times. Kenny acknowledges that he and Robinson were both at the base of the stairs during shots 4-7 and close to each other. But he also claims they were "very close together" during the first three shots. Yet, three of the shots do not have stippling, indicating that Robinson was not in close range aggressing on Kenny at the time of at least three of the shots. (*Compare* Dkt. 102 and Dkt. 102.1, Exs. 161 and 162 to Kenny Depo. (Kenny's diagram of relative positioning in the stairwell); Dkt. 40, Kenny Depo. at 97-117 (explaining Exs. 161 and 162); Dkt. 94.3, Ex 72 to De La Rosa Depo. (Interview of Officer Kenny), at 42-44 (first three shots fired when they were "very close together" with Kenny striking him at the time) *with* Dkt. 93, Arden Report at 6, 3-5; Dkt. 90, Marso Report at 4; Dkt. 65,

Di Maio Report at 9 (Kenny's description of "physical contact" at top of stairs would indicate expectation of stippling); Dkt. 96, Di Maio Depo. at 78-79, 210-11.)

88. Kenny claims that during the first three shots near the top of the stairs, he was a stair or two lower than the taller Robinson (Kenny is 5'10"; Robinson is 6'3"), who was standing above him and swinging at him. Kenny says he had his weapon in tight to his chest, and fired from his chest, with his gun angled up toward the taller and higher Robinson. But, if that were the case there should be three shots with upward, or at least horizontal trajectories through the body, and with entry points lower on Robinson's body. But instead, five of the seven shots have downward trajectories. (Dkt. 94.3, Ex. 72 to De La Rosa Depo, (Interview of Officer Kenny), at 30, 42-43; Dkt. 40, Kenny Depo. at 98-101, 106-07, 109, 265, 278; Dkt. 93, Arden Report at 4-5; Dkt. 90, Marso Report at 3-6; Dkt. 96, Di Maio Depo. at 3-5.)

89. Moreover, the fatal shots through the heart that Kenny's expert claim were among the first three shots fired near the top of the stairs all have significant to severe downward angles, and entry points high on Robinson's chest (at the level of the nipples or higher). If Kenny was firing from his chest with his gun angled upward at a taller and higher target, these entry points and trajectories could only be achieved if Robinson was severely bent over or falling, that is, inconsistent with punching or attacking Kenny. (Dkt. 38, Arden Depo. at 4-6; Dkt. 90, Marso Report at 3-6; Dkt. 37, Marso Depo. at 104; Dkt. 96, Di Maio Depo. at 190 (regarding contact wound E that he claims is at top of stairs: "Q: What you can say is he's likely either falling down or in a position that's severely bent over after having thrown a punch, correct? A: Right"), 184-189 (acknowledging that extent to which Robinson would need to be bent forward to

create the downward trajectories in fatal shots would cause him to be falling down the stairs).)

90. The low-angle bullet track in the left wall near the top of the stairs also cannot be accounted for in Kenny's version of events. The low-angle could not be created by an initial burst of shots fired near the top of the stairs, and it could not be created by the second burst of shots fired downward at the base of the stairs. (Dkt. 90, Marso Report at 4, 6; Dkt. 37, Marso Depo. at 84-85, 118-20, 125-26.)

91. The absence of bloodspatter near the top of the stairs also contradicts Kenny's story about the shooting beginning near the top of the stairs, since one would expect to see bloodspatter from the shots. And, in Kenny's version of events where the first three shots near the top of the stairs included the contact wound to the chest and two more fatal shots to the chest, it is even more likely that there would have been immediate bloodspatter from the shots. His expert, Dr. Di Maio, claims there is backspatter on Kenny's gun, most likely during gunshot wound E fired in contact with Robinson at the top of the stairs; but then there should be additional blood near the top of the stairs from that shot other than the blood that landed on the gun. Yet, the only bloodspatter in the scene is found from the halfway point of the stairs to the bottom. (Dkt. 90, Marso Report at 4-5; Dkt. 37, Marso Depo. at 80, 133-34; Dkt. 106, Nelson Depo. at 73-74, 279-280; Dkt. 119, Tranchida Depo. at 28; Dkt. 65, Di Maio Report at 6 (backspatter), 9 (contact wound E at top of stairs); Dkt. 96, Di Maio Depo. at 154-61 (identifying circumstances in which you would expect to see bloodspatter immediately at location of impact, many applicable here).)

92. Kenny claims that Robinson continued to aggress toward him during the last four shots, but the video shows that during the last four shots Robinson was lying on the ground at the base of the stairs, with his legs out in front of him. He was not a threat. (Dkt. 126.5, Flessert Audio-Video Synch; Dkt. 126.6, McKay Audio-Video Synch; Dkt. 113.3, DOJ Synch Stills; Dkt. 113.4, McKay Synch Stills 4-7; Dkt. 40, Kenny Depo. at 33-35, 109-115; Dkt. 90, Marso Report at 3, 5; Dkt. 37, Marso Depo. at 82-83; Dkt. 66, Krenz Report at 36 (Defendants' depiction of Robinson's positioning on the seventh shot).)

93. Kenny admitted at his deposition that when he says Robinson continued to aggress toward him, he just means Robinson was "getting up" and nothing more. (Dkt. 40, Kenny Depo. at 115, "Q: And as you remember it . . . was Tony Robinson doing the same thing at the time you fired shots A, B, and C on this exhibit? A: Yes. Excuse me. Yes. Q: What was he doing? A: It appeared to me that he was getting up. Q: Is that what you have written on the document? A: Yes. Q: Anything else you recall Tony Robinson doing as you fired shots A, B, and C identified on this exhibit? A: No."); Dkt. 102.1, Ex. 162 to Kenny Depo.)

*Kenny's Abrasion to the Head and Purported Concussion*

94. After the incident, that evening Kenny was taken to the Emergency Department for routine "medical clearance." He had a small cut or abrasion on the left side of his head above the scalp line, which was treated by just cleaning the cut without a need for a bandage. Kenny denied having any pain, nausea, vomiting dizziness or visual changes. (Dkt. 40, Kenny Depo. at 161; Dkt. 93, Arden Report at 3; Dkt. 100.2, Ex. 229 to Dennis Depo. (Emergency Department Records), at 2-6.)



95. Kenny claims the cut occurred when Robinson punched him near the top of the stairs, but as set forth above Robinson never punched Kenny, and in fact never encountered him at the top of the stairs. (*See* ¶¶ 82-83, *supra*.)

96. To the extent Kenny got a minor cut on the left side of his head during the shooting, it was not caused by a punch. Most likely it occurred during the fourth through sixth shots when Kenny was lunging forward at the base of the stairs as Robinson fell to the base of the stairs. He either hit his head on the banister on the left wall of the stairwell, or his head hit the gun during recoil since Kenny was firing the fourth through sixth shots one-handed with his arm bent at the elbow, and off-balance and lunging forward with his head close to his arm. (Dkt. 40, Kenny Depo. at 114-116; Dkt. 126-10, DCI-1549.)

97. Kenny claims that he suffered a concussion as a result of Robinson punching him during the incident, but Kenny's medical expert, Dr. Dennis, acknowledged that there is no objective evidence that Kenny ever suffered a concussion. (Dkt. 98, Dennis Depo. at 69-70, 75-76; Dkt. 128, Kenny's Response to Plaintiff's First Requests to Admit, No. 9.)

Respectfully Submitted

By: /s/Anand Swaminathan

Jon Loevy  
Anand Swaminathan  
David B. Owens  
LOEVY & LOEVY  
311 N. Aberdeen Street, 3 Floor  
Chicago, IL 60607  
Phone: (312) 243-5900

Dated: November 7, 2016.

**CERTIFICATE OF SERVICE**

I, Anand Swaminathan, an attorney, certify that on November 7, 2016, I filed the attached Plaintiff's Response to Defendant Kenny's Motion to For Summary Judgment via the Court's CM/ECF system and thereby served a copy on all counsel of record.

/s/ Anand Swaminathan