STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

IN RE: PETITION TO APPOINT A SPECIAL PROSECUTOR TO COMMENCE PROSECUTION OF MATTHEW KENNY

PETITION FOR THE FILING OF A CRIMINAL COMPLAINT

I. INTRODUCTION

This action is brought pursuant to Wisconsin Statute §968.02(3) which permits the filing of a criminal complaint against Madison Police Officer Matthew Kenny in connection with his fatal shooting of 19-year-old Tony Robinson Jr. in Robinson's second-floor apartment on March 6, 2015. Undersigned counsel brings this petition on behalf of Petitioner and Complainant, Sharon Irwin-Henry, the victim's grandmother. Mrs. Irwin-Henry respectfully requests that the court issue an order authorizing the filing of a criminal complaint charging First Degree Reckless Homicide in violation of Wis. Stat. §940.02(1) or, in the alternative, Second Degree Reckless Homicide in violation of Wis. Stat. §940.06(1).

Wisconsin Statutes Section §968.02(3) states:

> If a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if the judge finds there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing. If the district attorney has refused to issue a complaint, he or she shall be informed of the hearing and may attend. The hearing shall be *ex parte* without the right of cross-examination.

Petitioner will show by affidavit and public record that Dane County District Attorney

Ismael Ozanne has refused to charge Officer Kenny. Petitioner will also demonstrate by public record and by records from the *Estate of Tony Robinson v. City of Madison et al,* Case No. 15-cv-502 (hereinafter *Robinson v. Madison),* the action filed in Federal District Court for the Western District of Wisconsin pursuant to 42 U.S.C.§1983, that probable cause exists to support the requested charges.

A. Judicial Notice

Petitioner respectfully requests this court to take judicial notice of the record in *Robinson v. Madison* pursuant to Wis. Stat.§902.01(4). Attached to this Petition as *Exhibit 41*, is an *Offer of Proof* providing this court with a detailed recitation of the facts with references to the record relied upon by Judge Peterson in the federal civil case.

B. Essential Uncontroverted Facts

The following facts establish the chronology and framework for this petition. These facts are uncontroverted and incontrovertible.

On March 6, 2015, Madison Police Officer Matthew Kenny (Kenny) responded to a "check person" call at 1125 Williamson St., Madison. When he arrived, he did not wait for back up but entered alone. Within seconds of entering the Williamson St. residence, Kenny shot Robinson seven times while both were in the stairwell. Four of the shots were fatal. This was the second time that Kenny had fatally shot an individual in the line of duty.

The Madison Police Department conducted its own internal investigation. Pursuant to Wisconsin law, this case was assigned to Division of Criminal Investigation (DCI) of the Wisconsin Department of Justice (DOJ) so they could conduct an independent investigation. On March 9, as part of this investigation, Kenny was interviewed at the Wisconsin Professional

Police Association (WPPA) offices. He was present with WPPA Attorney and the WPPA business manager. Prior to being interviewed, Kenny was permitted to walk through the scene and review dashcam video and audio, as well as photos and diagrams. During this interview Kenny gave his version of what transpired in the stairwell. He described close action with Robinson on the stair landing, in which he claimed Robinson was "aggressing" and punched him in the head. Reports of this investigation were turned over to Dane County District Attorney Ishmael Ozanne (Ozanne).

On May 12, 2015 Ozanne issued his decision that Robinson's death "was the result of a lawful use of deadly police force, and that no charges should be brought ***https://madison.com/wsj/news/video/full-video-of-da-ismael-ozannes-press-conference-in-tony-robinson-case/youtube_3e9468b5-7091-56b2-b42e-e7744ae24bed.html*** *(recording of press conference where Ozanne read the press release); (*See *Exhibit 38 - Ozanne Decision).* In support of his decision, Ozanne adopted the self-defense version provided by Kenny, specifically that Robinson and Kenny were in close proximity at the top of the stairs and that Robinson hit Kenny "with a closed fist on the left side of his head knowing him back and into the wall." *(Exhibit 30, Judge Peterson's Decision at 5).*

The internal investigation report found that Kenny had not violated MPD policies and recommended against any disciplinary actions. Like Ozanne, the Madison Police Department accepted Kenny's version as true.

Andrea Irwin, Robinson's mother, filed a 1983 action against Kenny and the City of Madison in the United State District Court for the Western District of Wisconsin, the Honorable James Peterson presiding, on August 12, 2015. She claimed that Kenny and the Madison Police

Department violated her son's Fourth Amendment rights. *Robinson v. Madison.* During the prosecution of that case a number of witnesses were deposed, including Kenny. Experts in the area of police practices and ballistics who had reviewed the physical evidence including autopsy results and dashcam videos were also deposed. After the depositions, Kenny and the City of Madison both moved for summary judgement. The court granted summary judgment as to the City of Madison but denied the motion as to Kenny. The Court ruled that the expert testimony and interpretation of the physical evidence created significant factual disputes regarding "what happened between Kenny and Robinson in the stairwell," and that "Kenny's version is far from unimpeachable." (*Exhibit 30, Judge Peterson's Decision at 41*). The Court noted that the expert opinions regarding the forensic evidence "undermine Kenny's account" as to the distance between the two men when the shots were fired. The Court specifically found that there were disputes as to whether Robinson in fact assaulted Kenny. Kenny filed for immediate review by the Court of Appeals, however the District Court held that Kenny's appeal was frivolous because it relied on an allegation that Robinson assaulted Kenny. The opinion states "[t]he genuinely disputed facts include whether Robinson attacked Kenny at all." (*Exhibit 29*). Ultimately, this case was settled for $3.35 million dollars, the largest settlement in an officer involved homicide in Wisconsin history at the time.

Kenny continues to work for the Madison Police Department.

II. APPLICABLE LAW

Wisconsin Statute §968.02(3) "operates as a limited check upon the district attorney's charging power and by its terms may be invoked only when a complainant can demonstrate that the district attorney has in fact refused to charge or is unavailable to do so." *State Ex Rel.*

Kalal v. Circuit Court, 2004 WI 58, 681 N.W.2d 110, 271 Wis. 2d 633. Section §968.02(3) requires a circuit judge to make two determinations prior to authorizing the issuance of a complaint: 1) that "the district attorney "*refuses* or *is unavailable* to issue a complaint;" and 2) that "there is probable cause to believe that the person to be charged has committed an offense." *Id*.

A. The District Attorney Has Refused to Charge Kenny

Ozanne's press release and the accompanying press conference described above unequivocally demonstrate that the Dane County District Attorney's Office refused to charge Kenny in 2015. (*Exhibit 38, Press Release, Dane County District Attorney, 5-12-15; See also* ***https://madison.com/wsj/news/video/full-video-of-da-ismael-ozannes-press-conference-in-tony-robinson-case/youtube_3e9468b5-7091-56b2-b42e-e7744ae24bed.html*** . Moreover, even after the 2017 ruling denying charges, Ozanne refused to even look at the case again despite the fact that Sharon Irwin-Henry met with him five times to ask him to reconsider in light of the new evidence and a federal judicial ruling. *(*See *Exhibit 37, Declaration of Sharon Irwin-Henry).*

B. Probable Cause

The law of probable cause is clear and simple. Probable cause is an *extremely low* standard. Probable cause is established if *any* reasonable inference supports a conclusion that the accused probably committed a crime, even if there are competing inferences that they did not. See *State v. Dunn*, **117 Wis. 2d 487**, **345 N.W.2d 69** (Ct. App. 1984); aff'd. **121 Wis. 2d 389**, **359 N.W.2d 151** (1984). Hearsay may be used to establish probable cause, *State v. O'Brien,* 349 Wis. 2d 667, 836 N.W.2d 840 *2014 WI 54,* and indeed, is routinely used, both in

criminal complaints and at preliminary hearings. All that is required is that the proponent show some indicia of reliability.

Here, the Petitioner seeks a probable cause finding to support the filing of charges of Reckless Homicide in violation of Wis. Stat. §940.02(1) or, in the alternative, Second Degree Reckless Homicide in violation of Wis Stat. §940.06(1). Under WIS JI-CRIMINAL 1022, the elements of First-Degree Reckless Homicide are:

1. The defendant caused the death of (Tony Robinson);
2. The defendant caused the death by criminally reckless conduct;
3. The circumstances of the defendant's conduct showed utter disregard for human life.

First Degree Reckless Homicide is mitigated to the lesser included of Second Degree in the absence of the third element requiring "utter disregard for human life." *Id*. The instruction describes "criminally reckless conduct" as conduct which:

1. created a risk of death or great bodily harm to another person;
2. and the risk of death or great bodily harm was unreasonable and substantial;
3. and the defendant was aware that (his) conduct created the unreasonable and substantial risk of death or great bodily harm.

Id.

For a criminal complaint, the factual basis must contain facts that support each element. Petitioner is proceeding under this standard.[1] The factual discussion below will lay out the evidence that strongly supports each of the elements of first- and second- degree reckless homicide. *State ex rel Evanow v. Serafim*, 40 Wis.2d 223 1968.

[1] [1]Petitioner is proceeding under this standard rather than the probable cause standard of preliminary examinations, which only requires a showing that the defendant committed *any* felony.

III. DISCUSSION

This case presents an unusual set of circumstances. Not only do we have the initial state investigation and decision, there is a voluminous record and judicial rulings from the subsequent federal case which at the very least cast substantial doubt on Ozanne's findings that the shooting was justified. While the legal framework for each was technically different – criminal liability vs. Fourth Amendment violation – the legal and factual questions were identical: Was Kenny's use of force objectively reasonable? Was it justified as an act of self defense? The radical difference in the two outcomes can be explained in no small part by extensive outside investigation and outside experts who reviewed and analyzed all of the evidence.

In support of this petition, Petitioner will frequently cite to the ruling in the federal case and the evidence supporting that ruling, including depositions of lay and expert witness and physical evidence. Petitioner will also refer to the original DCI and MPD reports and records and statements by Ozanne. All of these documents and records are attached as exhibits and are incorporated by reference.

A. Kenny's Arrival at the Scene

The following description of the opening moments of this tragic incident is from Judge Peterson's order, and is based on facts supported by physical and documentary evidence and not disputed by any of the parties:

> At 6:28 p.m., Javier[Limon] reported to the 911 operator that he was at a gas station on Williamson Street and that a "guy's tweakin. He's chasing everbody [sic] and fuckin yellin, and I don't know. He's tweakin on some shit . . . he's really outrageous right now. He fuckin scared me and my girlfriend." Dkt. 41-1, at 1. Javier said that he lived across the street from the gas station, gave his address, and described Robinson's appearance. The 911 operator asked Javier whether Robinson had any weapons; Javier responded, "I don't think so, no." *Id*. Javier told the operator that he had left the scene.

> Javier explained that Robinson was his friend and that he may have taken mushrooms, although he was not sure. Javier then reiterated that Robinson did not have a weapon and that he does not normally carry weapons. The operator told Javier that she was sending officers to check on Robinson, and the call concluded.
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> Kenny was on patrol that evening. At 6:31 p.m., 911 dispatcher Jeremiah Chang asked for the locations of officers D8 (Kenny) and D7 (MPD Officer John Christian). Kenny reported that he was on Wilson Street; Christian was in the police department property room. The dispatcher radioed "[f]or a check person. 1125 Williamson. Look for a M/B, light skin, tan jacket and jeans. Outside yelling and jumping in front of cars. 19 years of age. Name is Tony Robinson. Apparently he lives in MaFarland [sic]." Dkt. 39-1, at 1. The dispatcher reported that the 911 caller was no longer at the scene and "no weapons seen." *Id*. The dispatcher then reported that another 911 caller—a "victim," Lei Yang—reported that Robinson was at the gas station in that area. A third call about Robinson indicated that he had gone back inside Javier's apartment and that he had "[t]ried to strangle another patron." *Id*.
>
> By that point Kenny had arrived at 1125 Williamson Street. A witness at the scene flagged Kenny down and told him that Robinson had gone through the door at the side of the building to the upstairs apartment. Kenny had parked his squad in the driveway, with his dash cam pointed toward the door to the upstairs apartment. At 6:38 p.m., Kenny radioed, "I'm going to have to enter," id., drew his weapon, and went through the door to the stairway that led to the upstairs apartment. Seconds later, MPD Sergeant Jamar Gary radioed, "Shots fired."

(*Exhibit 30, Judge Peterson Decision pages 3-5)*

Judge Peterson noted that Kenny's dash cam, synched with the audio from Officer Gary's microphone,[1] provided objective evidence of this undisputed sequence of events. "The video shows Kenny pulling into the driveway at 1125 Williamson Street, exiting his vehicle, and approaching the house. He looks around the back of the house and toward the upper apartment windows, climbs onto the porch near the door, appears to say something into his radio, and places his hand on his weapon. At this point, the audio kicks in, presumably marking Gary's arrival. Just under 20 seconds pass from Kenny going through the door to the shooting." (*Id*. at 5)

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[1] [1] The two recording devices were synched because Kenny was not wearing a microphone or body camera. None of the parties objected to the synching of the dash cam and audio or to Judge Peterson's reliance on it.

Peterson went on to state the following additional facts which were agreed to by the parties: Kenny was not wearing his microphone in violation of MPD policy; Gary arrived before Kenny went into the stairwell; Kenny went into the stairwell without waiting for backup; "Kenny did not radio that he saw or heard any signs of a disturbance or exigency. Kenny heard only one voice coming from the upstairs apartment." (*Id* at 6) The court was also well aware that Kenny believed that Robinson may have been suffering from a quasi-mental health condition known among law enforcement as "excited delirium." (*Id* at 18).

When assessing whether Kenny behaved recklessly and with the statutorily required state of mind when he shot and killed Tony Robinson, we must consider the totality of the circumstances, including events and actions that preceded the shooting. *State v. Jensen* 2000 WI 84. While no one is suggesting that Kenny's actions up to the point when he entered the house could, standing alone, be the basis for the homicide charges, they must be considered as part of the picture. Judge Peterson took a similar totality of the circumstances approach when he ruled that the Fourth Amendment claims against Kenny could withstand a motion for summary judgment. (*Id* at 22 & 42.)

Perhaps the most damning evidence about Kenny's conduct prior to entering the house relates to his failure to wait for back up, which was in fact coming in right behind him. Kenny himself admitted that he was trained to wait for backup as a general rule. He was also trained that in cases where they suspect someone is suffering from excited delirium, officers should wait for backup rather than pursuing a subject alone. Kenny was also trained that tasers are the preferred use of force device for addressing individuals suspected of excited delirium. (*Exhibit 3: Kenny Depo. at 332; Exhibit 4: Waller Report at 8-9; Peterson at 18,19)*.

Dennis Waller, a police practices expert,[2] offered a number of opinions about Kenny's pre-entry conduct:

- The intentional and reckless decision Officer Kenny made to enter the apartment without assistance was tactically unsound; contrary to law enforcement training concepts for handling disturbance calls; contrary to basic officer survival considerations; and inconsistent with, and counterproductive to, the protocol for successfully handling someone likely to be experiencing excited delirium

- Officer Kenny's stated necessity for entering the apartment without backup was contradicted by his actions upon entering and his subsequent statements.[3]

- Officer Kenny's decision to draw his firearm and enter the stairway to the apartment without the presence of backup reduced his other force options

In looking at the reasonableness of Kenny's actions as he went into the house, we must also consider the nature of the call and what the officer knew. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Here, Kenny knew that he was responding to check on an unarmed person who may have excited delirium – a mental health condition. Or as Judge Peterson put it, "Kenny was dispatched to a check person – not a crime in progress. Nor was Kenny attempting to arrest Robinson." *(Exhibit 30)*

Simply put, from the moment he arrived at 1125 Williamson, Kenny behaved in a reckless manner. He knowingly violated MPD policy about his microphone: he violated training about waiting for backup even though there was no known exigency, and even though Officer Gary was literally seconds behind; and he violated training about approaching an individual with suspected excited delirium without another officer. Kenny's recklessness began long before he entered the stairwell, and it set the stage for what happened next.

[2] Kenny moved to exclude Waller's opinions under *Daubert* and as being unreliable. That motion was denied.

[3] It is also contradicted by Kenny's radio call as he entered. He said nothing about a disturbance or any kind of emergency.

B. What Happened in the Stairwell

In the end, this case ultimately turns on one question. – what happened between Robinson and Kenny in the stairwell on March 6. There is, as Judge Peterson observed, only one witness – Kenny, but we cannot simply take Kenny at his word.

Kenny's Statements

Within a few minutes of the shooting, Officer Kenny gave a "snapshot" statement to Sergeant Gary, intended as a brief summary of the circumstances so that immediate investigative steps could be taken if needed. In his "snapshot," Kenny claimed (1) that he heard more than one voice upstairs; (2) that Robinson 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 Robinson had punched him. *Exhibit 4: Waller Report at 7, 11.* **In violation of the Madison Police Department Code of Conduct and in violation of the Wisconsin law against obstructing, Kenny later admitted that *none* of these things were true.** (*Exhibit 30 at 9; Exhibit 3: Kenny Depo. at 356-60; Exhibit 4: Waller Report at 7, 11.)*

Other than the snapshot, Officer Kenny was not required to give a formal or detailed statement to DCI or to MPD after the shooting. Instead, he was given a few days to rest and was then interviewed by DCI three days later at the office of his attorney and union business manager. *Exhibit 24: De La Rosa Depo. at 231-32; Exhibit 25: Fernandez Depo. at 198- 200; Exhibit 3: Kenny Depo. at 162-63, 165-66, 181-82.* In addition to this "cooling off period," Kenny was afforded numerous other accommodations. Prior to giving his statement, Kenny was allowed to walk through the scene with his attorney and his union business manager. He was also permitted to view his dash cam video and to listen to the audio recording from Gary's

microphone with his attorney and business manager.[4] During the interview, Kenny was allowed to stop the process, take a break and confer with his attorneys. Finally, on March 12, Kenny was allowed to meet with DCI agents, his attorney, and business agent in order to review his statement. (*Exhibit* 5 at 16)

The solicitous accommodations afforded Kenny have not gone unnoticed. Ms. Irwin-Henry argued that "the entire system favors the officer; the process is purportedly designed to help the officers prepare their testimony in light of the evidence at the scene." (*Exhibit* 30 at 11) After the Robinson case, an ad hoc review of Madison Police Department Policies and Procedure condemned the standard practice of waiting days to take a statement from an officer involved in a fatality[5] for a number of reasons including contamination of memory, potential fabrication and perceived unfairness. The review recommends that officers involved be interviewed by the end of the shift (as opposed to 24 – 72 hours later) to comport with best practices.

Be that as it may, the March 9 statement is what we have. In the statement, Kenny tells a story different from the snapshot given immediately after the shooting. Kenny described the radio calls about Robinson and his own belief that Robinson's behavior could be attributed to drugs or excited delirium. When he arrived at 1125 Williamson he heard thumping and a single voice yelling. He entered and went up the stairs with his weapon drawn. Just before the top of the stairs Robinson emerged and punched him in the head knocking Kenny into the wall.

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[4] At this point, the video and audio had not yet been synchronized. That becomes significant later in the federal action, when the synched audio-video distinctly contradicts Kenny's version.

[5] Madison Police Department Policy and Procedure Review Ad hoc committee For officer-involved fatalities, Department of Criminal Investigation guidelines specify that "[o]fficers may be allowed to go home to sleep and wait 24-72 hours after the incident to give a formal statement."

Robinson continued to swing but did not say anything. Kenny did not fall at the top of the stairs. Kenny shot three times at or near the top of the stairs. Robinson and Kenny were at very close range when the shots were fired. Kenny ended up at the base of the stairs. Robinson continued down the stairs which Kenny called "aggressing." At the base of the stairs, Kenny shot 4 more times. In terms of injuries, Kenny primarily reported a muscle strain in his knee. He also said he had a headache. A full transcript and agents' summary can be found in the DCI report. *(Exhibit 39, Full DCI Report; a transcript of Kenny's interview beginns at page 760*).

Kenny was deposed a year later for the civil case. The narrative was substantially the same, with Kenny again contradicting his original statement to Gary. He went into the house with his gun drawn and went up the stairs after hearing a voice. Tony Robinson came out and punched him in the head. Kenny shot three times and then ended up at the bottom of the stairs. Robinson came down the stairs and Kenny shot three or four more times. Robinson said nothing until he was on the ground dying. Kenny also now claimed that he had post-concussion syndrome as a result of his encounter with Robinson that was diagnosed several months after March 9. (*Exhibit 3, Depo of Kenny*)

The big difference between the deposition and the statement of March 9 is in tone and details. This time Kenny was not speaking to a friendly audience of fellow law enforcement. Rather he was questioned adversely by plaintiff's attorney who confronted him with inconsistencies and physical evidence, including the synched audio/video[6] - much the way that a non-law enforcement suspect is questioned by police. Perhaps the most startling testimony in

[6] Kenny took some issue with the synched version based upon his memory (45-46), however as Judge Peterson noted, all parties, including Kenny, stipulated to the accuracy of the synch prior to the summary judgment rulings and had no objection to the Court relying on it to decide the motion.

light of subsequent court rulings is *Kenny's acknowledgment that if Robinson did not punch him at the top of the stairs (or anywhere), he would not have been justified in shooting him. And that shooting under that circumstance would have not been authorized under MPD policy. (Id. at* 87-88).

C. Kenny's Credibility: Expert Witnesses and Physical Evidence

Judge Peterson described the court's approach to Kenny's motion for summary judgment this way: "'where the officer [] is the only witness left alive to testify… a court must undertake a fairly critical assessment of the forensic evidence, the officer's original reports or statements, and the opinion of experts to decide whether the officer's testimony could reasonably be rejected at a trial.' *Plakas v. Drinski,* 19 F.3d 1143, 1147 (7th Cir. 1994). The Court then observed, "[h]ere, Kenny's version of events is far from unimpeachable." (*Exhibit* 30, Judge Peterson's Decision).

The first piece of evidence that raises serious doubts about the veracity of Kenny's version is the synched dash cam/audio microphone and the analysis by forensic science expert Samuel A Marso. (Exhibit 18). After closely analyzing the synched video Marso opined that the video "indicates that Kenny did not have enough time to fire his initial shots from the top of the stairs when he clearly completed his first volley from the bottom of the stairs." (*Exhibit 30, Peterson's Decision at 26*). Marso concluded that Kenny "fired all seven shots from the bottom of the stairs[.]" (*Id*.) and that after the first shot "Robinson bent forward or began to fall." (Id. at 27). Jonathan Arden MD, a forensic pathology expert also considered the dash cam/audio and concluded that the synched recording "demonstrated that the entire shooting sequence took about four seconds, and that Officer Kenny was backing out of the door during the interval (in

the second between the three- shot volleys). This shows that he was at or near the bottom of the stairs during the entire shooting event." *(Id. at 25 citing Arden deposition).* The video further shows that the last shot was fired as Kenny was actually out of the door. At that moment he yelled "stop right there, don't move." Robinson's feet were seen lying on the ground pointing up. *(Exhibits 7, 8, 16,17)*.

The ballistics and autopsy evidence cast an even wider shadow over Kenny's credibility. This analysis and testimony was provided by Marso and Arden, with Arden providing a more technical analysis based on his expertise as a pathologist.

First Arden considered the trajectory of the bullets, four of which were fatal. Trajectory demonstrates the position of the shooter relative to the victim and the position or angle of the gun when it was fired. Arden found that the bullet trajectories directly contradict Kenny's narrative. "Kenny's version of events places him on the stairs just below Robinson when Robinson punches him, prompting Kenny to fire three bullets into Robinson at an upward angle. Arden opines that 'all of the wounds to the torso [six of the seven shots fired]…have downward components to their trajectories, which would be very difficult to accomplish if [Kenny] were shooting from below unless Mr. Robinson's upper body was bent over to the point of being nearly horizontal or he was inverted from tumbling or falling forward." *(Id. at 24 quoting Arden report)*. If Kenny did fire at Robinson from below, Robinson could not have been standing upright." *(Exhibit 30 at 24).*

The other aspect of the analysis concerned "range-of fire" evidence. This relates to the distance of the gun's muzzle from the bullet's point of impact with a body. Range of fire is

determined in large part by looking at what is colloquially referred to as "powder burns." [7] Here Arden cited "gunpowder stippling (unburned or partially burned gunpowder particles that embed just beneath the skin, forming a pattern of small red or brown dots)" decision at 24 and concluded that Kenny fired three of the four fatal shots from less than 24 inches away (but possibly up to 36-40 inches). The remaining fatal shot had stippling *and* made a muzzle imprint, indicating that the muzzle of the gun made contact with Robinson's skin when Kenny fired." (*Id. at 24*). As for the three non-fatal shots, they were beyond the contact, close-range or intermediate range as evidenced by the lack of stippling or other soot. "Arden concludes that Kenny's account of the shooting is inconsistent with the gunpowder residue evidence because at least one of the wounds with a sharp downward trajectory was a tight contact wound, and at least three shots (the non-fatal shots) were fired from a distance beyond close or intermediate range." *(Id. at 25).*

Marso, with training in firearm and tool mark identification, reached similar conclusions about the angle and distance. He opined "that Kenny fired the three non-fatal shots from the greatest distance away (as evidenced by the lack of stippling)." (*Id. at 27*). Looking at the dash cam, Marso concluded that shots four, five, and six were fired 'in very close proximity' to Robinson and, therefore, likely to cause stippling." (*Id. at 27*). Marso also observed that "all discharged cartridge case were at the bottom of the stairs," further, supporting the opinion that shots came from the bottom of the stairs. (Id. at 26).

[8] These appear in autopsy pictures and are often discussed in the original autopsy report. While there are photographs of Mr. Robinson's body, the autopsy report here does not discuss this aspect of Robinson's death.

D. Drywall

One piece of evidence that is significant by its absence, is drywall. According to Kenny, Robinson punched him in the head at the top of the stairs and knocked him into the wall. This allegedly made a dent in the drywall approximately 3 feet from the stair where Kenny would have been standing. This hole or dent is pictured in Exhibit 36. There is only one problem (other than the fact that Kenny would have seen the hole during his walk through of the scene): There is absolutely no evidence of any drywall bits on Kenny's face, in his hair, or on his uniform in the photographs taking immediately after. (*Id.*) Nor is there any mention of drywall in his medical records from his visit to urgent care that day.

Moreover, given the height of the dent – 3 feet up from where Kenny claimed he was standing, it would have been impossible for Kenny – who is 5'10' to make that dent with his head unless he was sitting. But by his own statement and testimony, he was not near or on the ground until he was at the bottom of the stairs.

E. Kenny's "Concussion"

In his initial statement to DCI, Kenny did not claim that he had a concussion, nor does any mention of a potential concussion appear in the medical records from March 6. In fact, when he went to Urgent Care that night, Kenny denied having any of the symptoms typically associated with a concussion.

However, by the time he was deposed, Kenny claimed that he suffered from a concussion and migraines as the result of Robinson's actions. But as the federal court pointed out, there is absolutely no objective evidence such as medical records of concussion other than Kenny's say so. (*Exhibit 30 at 8)*

IV. PETITIONER HAS SHOWN PROBABLE CAUSE

A. The Record From the Federal Case Establishes Probable Cause

Here, the petitioner is not simply asking that the court review Ozanne's decision and the evidence that may or may not have supported that decision. Instead, we are requesting that this court expand the inquiry to include the evidence and rulings in the federal case. In that light, probable cause is easy.

If the person who shot Robinson had been a civilian rather than a police officer, there is no question that probable cause would be found to support a charge of reckless homicide, or more likely, first-degree intentional homicide, even if the defendant claimed self-defense.[8] To put it simply, Kenny shot an unarmed 19-year-old seven times in his own home. And, Kenny had shot and killed somebody else six years earlier.

But because Kenny was acting in his official capacity as a police officer, we must take a different approach and address the objective reasonableness of his use of deadly force. *Graham v. Connor*, 490 U.S. 386 (1989) lays out the standard:

> Its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight…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…The calculus or reasonableness must embody allowance for the fact that police are often forced to make split-second judgments… [T]he reasonableness inquiry in an excessive force case is an objective one.

Id. at 394-397

[9] An affirmative defense like self-defense or mistake will not defeat a finding of probable cause.

Though *Graham* is a Fourth Amendment §1983 case, its holding and rationale have found their way into the criminal realm as well.[9] Indeed, *Graham* permeates Ozanne's decision though he did not cite it. The standard applies whether we are looking at a claim that law enforcement violated an individual's Fourth Amendment rights, as in the federal case, or in a potential criminal case such as this. The *Graham v. Connor* reasonableness standard has also found its way into jury instructions and factor in anytime an officer is actually charged with a crime for the use of force.

In this case, we do not have any eyewitnesses other than Kenny. Tony Robinson, the other individual in the stairwell, is dead. Kenny was not wearing his microphone, so we cannot hear if anything was said in that stairwell other than what was picked up on the synched audio/video outside, and there certainly were no bystanders with phones. Kenny painted a picture of close combat at the top of the stairs and claimed that under those circumstances he had no choice but to shoot and keep shooting. But as with every other case, common sense dictates that we cannot simply take Kenny at his word - especially since it's been demonstrated that he lied. Responsible practice means that we must look at any available and physical evidence to determine whether Kenny's actions match his words, and were in fact reasonable.

When the case reached federal court, the factual landscape changed dramatically from the initial DCI/MPD investigations and charging decision. Outside experts in police practices said that Kenny's actions were unreasonable from the moment he entered the stairwell at 1125 Williamson St. without backup and his actions continued to be unreasonable all the way through

[9] See e.g. Jury Instructions, *State of Minnesota v. Derek Michael Chauvin* https://www.startribune.com/read-the-judges-instructions-for-the-jury-in-the-derek-chauvin-murder-trial/600047788/

the firing of the last shot.[10] The ballistic and forensic evidence demonstrates that three of the shots were fired beyond an intermediate distance (shots A,B, and G), four of them at close range standing over him (D, C, E and F) and that all shots were fired while Kenny was at the bottom of the stairs. All of the bullet casings were found on the porch and outside on the drive way and blood spatter started on the 6th step of the stairway. If this is so, then practically everything that Kenny said about what happened in that stairwell is false. If this is so, then there is every reason (well beyond probable cause) to believe that Kenny's actions were not reasonable at all. In fact, as Kenny himself said, if he was not punched by Robinson, he would not have been justified in shooting him.

Judge Peterson was troubled by questions of Kenny's credibility. The decision referred to "Kenny's purported belief that Robinson posed an imminent threat of death or serious bodily harm[.]" (Exhibit 30 at 41). The decision also stated what had become obvious: "Kenny's motion [for summary judgment] depends on the court accepting his very specific version of events, in which Robinson attacks him with such force and persistence that any objective, reasonable officer in Kenny's position would have feared for his for his life…But evidence in the record offers an alternative story." (*Id. at 42*)

The Court was more pointed in response to Kenny's request for immediate appellate review, remarking "[t]he genuinely disputed facts include whether Robinson attacked Kenny at all." In that decision, the court encapsulated the situation this way: "Kenny is, of course, the only surviving eyewitness to the events in the stairway. But that does not compel the conclusion

[10]Police practices expert Waller summed up Kenny's recklessness conduct: "Officer Kenny acted in a manner that was not consistent with his training, ethical considerations, and the concept of using deadly force only as a last resort." (*Exhibit 30 at 19)*.

that Kenny's version of those events is undisputed. Plaintiff has adduced ample evidence that undermines Kenny's version of events and calls his credibility into question. Kenny's story about what happened in the stairwell has changed: he recanted his "snapshot" statement made immediately after the incident." *(Exhibit 29 at 4).*

Kenny himself conceded that if Robinson did not attack him, then he is not entitled to summary judgment. "If the Court believes that a reasonable jury could conclude that Officer Kenny simply walked into the stairwell, was never struck or punched by Mr. Robinson and simply opened fire at Mr. Robinson while he was more than three or four feet away from him on the stairwell, summary judgment is not appropriate." *(Id. at 4-5, citing Kenny's pleading)*.

For a finding of probable cause, this court need not make a finding of who is telling the truth. Probable cause does not require that the court resolve competing narratives or inferences.[11] It is more than enough that there is a substantial amount of reliable evidence that Kenny was not telling the truth and that in fact there was no threat to justify shooting of Tony Robinson. This supports a finding of probable cause to believe that Kenny acted unreasonably and therefore committed criminal homicide.

B. Ozanne's Decision Was Flawed and is not Binding

When Ozanne issued his decision on May 12th, he did not have the benefit of any outside expertise or analysis. He relied entirely on records from DCI and MPD. He paid extra attention to Kenny's version and adopted it uncritically as part of his rationale that he would not be able to prove Kenny's guilt beyond a reasonable doubt. Specifically, he would not be able to prove that Kenny's use of force was unreasonable. But we now know that Kenny's statements are

[11] *State v. Dunn; Franks v. Delaware,* 438 U.S. 154 (1978)

deeply impeachable. Moreover, in an unexpected twist, Ozanne said he believed that all the shots were fired from the bottom of stairs. He was correct in that assessment, but if it is true, then Kenny's story about firing three shots at the top of the stairs after being punched cannot be true. Ozanne also said that he believed that all the shots were fired at fairly close range. We know from the experts who examined the evidence that this is not true. Even if it were, and once again, all the shots were fired from the bottom of the stairs, then Kenny's version once again cannot be true. In other words, Ozanne's own reading of the evidence casts serious doubt on the very narrative he relies upon to support his decision not to charge Kenny.

But even if Ozanne's opinion were the model of thoroughness, accuracy, and consistency, it is certainly not binding on this court. Wisconsin Statute §968.02(3) does not prevent a court from taking a "second look" at a District Attorney's decision to decline charging and it does not prevent the appointment of a special prosecutor to review the local prosecutor's work.

V. CONCLUSION

For the above stated reasons, considering the facts and law stated above, Petitioner respectfully requests that this court permit the filing of a criminal complaint and appointment of a special prosecutor. Pursuant to Wis. Stats. §§906.11(1) and 902.01 we respectfully request that the court find that the initial requisite of §968.02(3) has been met with regard to the refusal or unavailability of the Dane County District Attorney. We further request that the court accept our arguments, facts and cited law as probable cause that a crime has been committed in Dane County. We request that your review be without an evidentiary hearing based on our accumulated evidence as all of the subsections of §906.11(1) are met. Finally, we

request a date be set for a decision on this petition as to whether the appointment of a Special Prosecutor, without ties to any law enforcement agencies, is warranted.

Dated at Madison, Wisconsin this 21st day of March, 2022.

Respectfully submitted,

s/Syovata K. Edari
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