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

THE ESTATE OF TONY ROBINSON, JR., *ex rel.* PERSONAL REPRESENTATIVE ANDREA IRWIN,

Plaintiff,

v.

MATTHEW KENNY,

Defendant.

[DRAFT]
INTRODUCTORY JURY INSTRUCTIONS

15-cv-502-jdp

Members of the jury, we are about to begin the trial of this case. I will take about 15 minutes now to give you some instructions to help you understand how the trial will proceed, how you should evaluate the evidence, and how you should conduct yourselves during the trial.

The party who begins the lawsuit is called the plaintiff. In this case, the plaintiff is the Estate of Tony Robinson, Jr., by his mother, Andrea Irwin, as the personal representative of the estate. The party against whom the suit is brought is called the defendant. In this case, the defendant is Matthew Kenny, a City of Madison police officer.

This is a civil rights case that arises from events that occurred about two years ago. After a 911 call, Madison Police Officer Matthew Kenny was sent to a residence on the east side of Madison, where he encountered a young man named Tony Robinson. Exactly what happened is disputed, but Officer Kenny ended up shooting

Mr. Robinson, and Mr. Robinson died. Plaintiff claims that Officer Kenny violated Mr. Robinson's constitutional rights by using excessive force. Officer Kenny denies using excessive force. He contends that Mr. Robinson attacked him and that his use of deadly force was reasonable.

Your job, as jurors in this case, is to decide whether it was objectively unreasonable for Officer Kenny to use deadly force against Tony Robinson.

CONDUCT OF THE CASE

The case will proceed as follows:

First, plaintiff's counsel will make an opening statement outlining plaintiff's case. Immediately after plaintiff's statement, defendant's counsel will make an opening statement outlining defendant's case. What is said in opening statements is not evidence; it is simply a guide to help you understand what each party expects the evidence to show.

Second, after the opening statements, the parties will present the evidence. The evidence will come to you in phases. Plaintiff will begin with evidence in support of her case. Defendant will then present his case. Finally, plaintiff may choose to present rebuttal evidence in support of her case.

Third, after the evidence is presented, I will instruct you on the law that you are to apply in reaching your verdict. I will give you copies of all my instructions,

including these instructions that I am reading now, so you will have them in writing when you deliberate.

Fourth, the parties will make closing arguments explaining what they believe the evidence has shown and what inferences you should draw from the evidence. What is said in closing argument is not evidence. Plaintiff will make the first closing argument, and she can make a short rebuttal argument after defendant's closing argument.

Fifth, I will give you some final instructions on deliberations, and you will retire to the jury room to conduct your deliberations.

The trial day will run from 9:00 a.m. until 5:30 p.m. Usually, you will have at least an hour for lunch and two additional short breaks, one in the morning and one in the afternoon. Sometimes I will have to adjust this schedule to take care of something in another case, so we will be somewhat flexible. The courtroom is often kept at a cold temperature; I encourage you to bring clothing that will keep you comfortable in a range of conditions.

During recesses you should keep in mind the following instructions:

First, do not discuss the case either among yourselves or with anyone else during the course of the trial. I realize that this case is the one thing you all have in common, but you must not talk about it, even amongst yourselves, until it is time to deliberate. Once you express an opinion, there is a natural tendency to defend it and this might make you resist changing your mind. The parties to this lawsuit have a

right to expect from you that you will keep an open mind throughout the trial. You should not reach a conclusion until you have heard all of the evidence and you have heard the lawyers' closing arguments and my instructions to you on the law, and you have retired to deliberate with the other members of the jury. I must warn you, in particular, against commenting about the trial in an email or a blog or on Twitter or any social media website. There are cases that have had to be re-tried because a member of the jury communicated electronically about the case during the trial. You can imagine what this would mean in the cost of a re-trial, the inconvenience to your fellow jurors whose work would have been done for nothing, and the stress experienced by the parties.

Second, do not let anyone else discuss the case in your presence. If anyone tries to talk to you despite your telling him not to, report that fact to the court as soon as you are able. Do not discuss the event with your fellow jurors or discuss with them any other fact that you believe you should bring to the attention of the court.

Third, although it is a normal human tendency to converse with people with whom one is thrown into contact, please do not talk to any of the parties or their attorneys or witnesses. By this I mean not only do not talk about the case, but do not talk at all, even to pass the time of day. If one of the attorneys or witnesses passes by without talking to you, they are not being rude; they are simply following my instructions. In no other way can all parties be assured of the absolute impartiality that they are entitled to expect from you as jurors.

Fourth, do not read about the case in the newspapers, or listen to radio or television broadcasts about the trial. If a newspaper headline catches your eye, do not examine the article further. Media accounts may be inaccurate and may contain matters that are not proper for your consideration. You must base your verdict solely on the evidence presented in court.

Fifth, no matter how interested you may become in the facts of the case, you must not do any independent research, investigation, or experimentation. Do not look up materials on the internet or in other sources. Again, you must base your verdict solely on the evidence presented in court.

When this case is over, you can talk about it with anyone you want and you can read whatever you want about it. But until it is over, you must keep quiet about it and you must restrict yourself to the evidence presented in the courtroom.

HEARING THE EVIDENCE

Evidence

Evidence at a trial includes the sworn testimony of the witnesses, exhibits that are offered and accepted by the court, facts that are stipulated to by counsel on both sides, and facts that are judicially noticed. If facts are stipulated or judicially noticed, I will tell you that. You may consider only the evidence that I admit into the record.

The following things are not evidence: questions and objections of the lawyers, testimony that I instruct you to disregard, and anything you may see or hear when

the court is not in session, even if what you see or hear is done or said by one of the lawyers, by the parties, or by one of the witnesses. You should listen carefully to the opening statements and closing arguments of the lawyers because they will help you understand the evidence. But those statements and arguments by the lawyers are not evidence. Decide the case on the evidence.

Evidence may be either direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness said or heard or did. Circumstantial evidence is proof of one or more facts from which you could infer the existence of another fact. If the question were whether it was raining on September 1, direct evidence of this fact would be a witness's testimony that they were outside and they saw it raining that day. Circumstantial evidence of the fact that it was raining would be that people came into a building carrying wet umbrellas that day. You should consider both types of evidence. Neither direct nor circumstantial evidence is automatically more persuasive or valuable than the other type. It is up to you to decide how much weight to give any piece of evidence.

Drawing of Inferences

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw reasonable inferences or conclusions from the facts that you find have been proven, if such reasonable inferences or conclusions seem justified in the light of your own experience and common sense.

Burden of Proof

You will hear the term "burden of proof" used during this trial. In simple terms, the phrase "burden of proof" means that the party who makes a claim has the obligation of proving that claim. At the end of the case, I will instruct you on the proper burden of proof to be applied to the issues in this case.

But here is the basic burden of proof concept that you should bear in mind as you hear the evidence. Plaintiff has the burden of proving that Matthew Kenny's use of deadly force against Tony Robinson was objectively unreasonable by a preponderance of the evidence. "Preponderance of the evidence" means that when you have considered all the evidence in the case, you must be persuaded that it is more probably true than not true.

Credibility of Witnesses

In deciding the facts, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, part of it, or none of it. In considering the testimony of any witness, you may take into account many factors, including the witness's opportunity and ability to see or hear or know the things that the witness testifies about; the quality of the witness's memory; the witness's appearance and manner while testifying; the witness's interest in the outcome of the case; any bias or prejudice that the witness may have; other evidence that may have contradicted the witness's testimony; and the reasonableness of the

witness's testimony in light of all the evidence. The weight of the evidence does not necessarily depend upon the number of witnesses who testify.

Contradictory or Impeaching Evidence

A witness may be discredited by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness's present testimony.

If you believe any witness has been discredited, it is up to you to decide how much of the testimony of that witness you believe.

If a witness is shown to have given false testimony knowingly, that is, voluntarily and intentionally, about any important matter, you have a right to distrust the witness's testimony about other matters. You may reject all the testimony of that witness or you may choose to believe some or all of it.

The general rule is that if you find that a witness said something before the trial that is different from what the witness said at trial you are to consider the earlier statements only as an aid in evaluating the truthfulness of the witness's testimony at trial. You cannot consider as evidence in this trial what was said before the trial began.

There is an exception to this general rule for witnesses who are the actual parties in the case, or who are the employees or agents of the parties. If you find that any of the parties, or employees or agents of the parties, made statements before the

trial began that are different from the statements they made at trial, you may consider as evidence in the case whichever statement you find more believable.

Experts

A person's training and experience may make him or her a true expert in a technical field. The law allows that person to state an opinion here about matters in that particular field. It is up to you to decide whether you believe the expert's testimony and choose to rely upon it. Part of that decision will depend on your judgment about whether the expert's background of training and experience is sufficient for him or her to give the expert opinion that you heard, and whether the expert's opinions are based on sound reasons, judgment, and information.

During the trial, an expert witness may be asked a question based on assumptions that certain facts are true and then asked for his or her opinion based upon that assumption. Such an opinion is of use to you only if the opinion is based on assumed facts that are proven later. If you find that the assumptions stated in the question have not been proven, then you should not give any weight to the answer the expert gave to the question.

Depositions

During the course of a trial, the lawyers may refer to and read from depositions. Depositions are transcripts of testimony taken while the parties are preparing for trial. Deposition testimony is given under oath just like testimony given

during the trial. You should give it the same consideration that you would give it had the witnesses testified here in court.

Objections

During the trial, you will hear the lawyers make objections to certain questions or to certain answers of the witnesses. When they do so, it is because they believe the question or answer is legally improper and they want me to rule on it. Do not try to guess why the objection is being made or what the answer would have been if the witness had been allowed to answer the question.

If I tell you not to consider a particular statement that has already been made, put that statement out of your mind and remember that you may not refer to it during your deliberations.

Questions

During the trial, I may sometimes ask a witness questions. Please do not assume that I have any opinion about the subject matter of my questions.

If you wish to ask a question about something that you do not understand, write it down on a separate slip of paper. When the lawyers have finished all of their questions to the witness, if your question is still unanswered to your satisfaction, raise your hand, and I will take the written question from you, show it to counsel, and decide whether it is a question that can be asked. If it cannot, I will tell you that. I will try to remember to ask about questions after each witness has testified.

Notetaking

If you want to take notes, there are notepads and pencils next to the jury bench. This does not mean that you have to take notes; take notes only if you want to and if you think they will help you to recall the evidence during your deliberations. Do not let notetaking interfere with your important duties of listening carefully to all of the evidence and of evaluating the credibility of the witnesses. Keep in mind that just because you have written something down does not mean that the written note is more accurate than another juror's mental recollection of the same thing. No one of you is the "secretary" for the jury, charged with the responsibility of recording evidence. Each of you is responsible for recalling the testimony and other evidence.

Although you can see that the trial is being recorded by a court reporter, you should not expect to be able to use trial transcripts in your deliberations. You will have to rely on your own memories.