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.

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

Defendants.

No. 15-CV-502

Hon. Judge Peterson

PLAINTIFF'S REPLY IN SUPPORT OF HER MOTION TO CERTIFY DEFENDANT KENNY'S QUALIFIED IMMUNITY APPEAL AS FRIVOLOUS

Plaintiff, Andrea Irwin, as personal representative of the Estate of Tony Robinson Jr., by and through her undersigned counsel, respectfully replies in support of her motion to certify, Dkt. 259, and states:

Kenny's qualified immunity appeal is frivolous; it is plainly barred by *Johnson v. Jones*, 515 U.S. 304 (1997). Indeed, Defendant Kenny has made extraordinary admissions in pleadings and in testimony that make this case uniquely suited for certification as frivolous.

First, Kenny claims in his response —as he must—that he is entitled to summary judgment on Plaintiff's facts. Dkt. 260 at 6. But this is simply false. Kenny's own summary judgment reply brief plainly conceded that he is not entitled to summary judgment on Plaintiff's facts:

> At the outset, Officer Kenny will acknowledge what he must: while he maintains that it is an entirely unsupported narrative, 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.

Dkt. 150, at 10 (emphasis added).This is precisely what Plaintiff contends happened. And, as explained in the motion, this Court's finding that disputed issues of material facts that preclude summary judgment is not a reviewable in a narrow interlocutory qualified immunity appeal. That should end this altogether.

Put another way, an appeal would be non-frivolous only if Kenny could in good faith argue that qualified immunity would be warranted even if Robinson never struck or punched him. To his credit, nowhere in his response to Plaintiff's motion to certify does Kenny attempt to make that argument. It was of course clearly established in 2015 that Kenny could not use deadly force against an unarmed individual without a reasonable basis to be in fear of great bodily harm or injury. *See Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985); *Sallenger v. Oakes*, 473 F.3d 731, 740 (7th Cir. 2007) (affirming denial of qualified immunity where parties disputed the extent and justification for blows administered to the head); *Sherrod v. Berry*, 856 F.2d 802, 805-06 (7th Cir. 1988) (*en banc*).

Kenny could not possibly dispute that it was clearly established, since he himself admits that his shooting would be unjustified if Plaintiff's facts were adopted. For example, at his deposition the testimony was:

> Q: So if you take out the punches and he just comes around the corner and he's moving forward, are you justified in shooting?
> A: No. I would not have shot then.
> Q: Would you have been justified in shooting?
> A: You're asking me to speculate. No, I don't believe that I would have been justified in shooting.

Dkt. 40, at 87-88.

So, in pleadings and testimony, Kenny has admitted that both summary judgment and qualified immunity are unavailable on Plaintiff's facts. Rather than acknowledge as much, Kenny's response to Plaintiff's motion to certify rests on the assumption of *his* facts. Kenny's entire anticipated appeal about whether a right was clearly established presupposes the idea that he was in "close combat" and physically attacked before he started shooting. Kenny argues:

> In its Opinion here, the Court acknowledged several factual disputes regarding the bullet trajectory and distance, but did not identify (because it was not provided any by the plaintiff) any closely analogous case law that held Officer Kenny['s] use of deadly force was unlawful <u>in the wake of a physical attack</u>, regardless of whether Kenny began shooting at the top of the stairs or at the bottom of the stairs.

Dkt. 260, at 9-10 (emphasis added). Here again, Kenny has illustrated that he is absolutely not entitled to a qualified immunity appeal by his own admission, because the factual scenario he suggests entitles him to qualified immunity is one in which Kenny fired at Robinson "in the wake of a physical attack." *Id.* That is obviously at the heart of the dispute here and illustrates that it is really a "factual" dispute, not one even arguably about the law or a "legal question."

Put simply, just as he did at summary judgment, Kenny has built his argument in response to this motion off of his own facts, not Plaintiff's. In its

summary judgment ruling, the Court recognized this, highlighted it, and rejected it. *See* Dkt. 236, at 42 ("Kenny's motion 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 life."). The Court should reject it a second time as frivolous.

The point of *Apostol* certification is to prevent litigants from being forced to endure unnecessary litigation where it is plain that the qualified immunity appeal is improper. *Cf.* D*ufour-Dowell v. Cogger*, 152 F.3d 678, 680 (7th Cir. 1998) ("Raising a defense of qualified immunity in the face of disputed facts that control the answer to the question is a waste of everybody's time."). The rule is about judicial economy, as well as cost and expense to the parties. The Seventh Circuit is therefore vigilant about rejecting "back door" efforts to contest the facts under the guise of a qualified immunity appeal. *Jones v. Clark*, 630 F.3d 677, 680 (2011). Thus, rather than forcing Plaintiff to go through the time and expense of filing a motion to dismiss the appeal, the cost of completely changing expert schedules, and the risk of witness unavailability, the Court should deny the motion so the parties can prepare for trial.[1]

Conclusion

For the foregoing reasons, Plaintiff's motion should be granted.

[1] The arguments made by Kenny in his summary judgment briefing illustrate that this case is really just like *McKinney v. Duplain*, 463 F.3d 679 (7th Cir. 2006) ("As *Johnson* made clear, a defendant 'may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial.'" *Johnson*, 515 U.S. at 319-20. Yet that is exactly what Officer Duplain is seeking to do: Officer Duplain maintains that the record does not support the district court's conclusion that a genuine issue of fact exists as to whether McKinney charged Officer Duplain, because the only evidence that supports the view that McKinney did not charge comes from the inadmissible opinions of the proffered experts.").

Respectfully Submitted,

By: /s/David B. Owens

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Dated: February 15, 2017.

CERTIFICATE OF SERVICE

I, David B. Owens, an attorney, certify that on February 15, 2017, I filed the foregoing response via the Court's CM/ECF system and thereby served a copy on all counsel of record.

/sDavid B. Owens