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KING COUNTY DEPARTMENT OF EXECUTIVE SERVICES INQUEST PROGRAM

IN RE INQUEST INTO THE DEATH
OF DAMARIUS D. BUTTS

No. 517IQ8013

SEATTLE POLICE DEPARTMENT'S
BRIEF ADDRESSING CRIMINAL MEANS
JURY INSTRUCTION

The City of Seattle, through the Seattle Police Department (hereinafter, “SPD”), hereby submits this brief addressing issues related to instructing the jury on criminal means.

INTRODUCTION

SPD objects to the jury instructions proposed by the family of Damarius Butts (“Family”) because the Justifiable Homicide defense must be presented to the inquest jury accurately and in its entirety to ensure a full, fair, and transparent review. There is no legal basis for the Family’s proposal to present only part of the applicable defense to the inquest jury or to limit the role of the inquest jury to the determination of probable cause.

SPD agrees to the proposed jury instruction proposed by the Inquest Administrator (IA), provided that limited, clarifying modifications described below are included.

1 **ARGUMENT**

2 **I. SPD objects to the incomplete proposal submitted by counsel for the family; the**
3 **defense of justifiable homicide should be presented to the inquest jury accurately and**
4 **in its entirety to ensure a full, fair, and transparent review.**

5 A. *Section 9A.16.040 of the RCW establishes an affirmative defense of Justifiable Homicide for*
6 *police officers who use deadly force in the line of duty.*

7 Chapter 9A.16 RCW creates various statutory defenses that can be raised by a criminal
8 defendant. *See* RCW 9A.16.010 to 9A.16.900; *State v. Arth*, 121 Wn. App. 205, 212, 87 P.3d 1206,
9 1209 (2004). It defines three different types of Justifiable Homicide, one of which applies
10 specifically to police officers. *See* RCW 9A.16.040 (justifiable homicide—police officers),
11 9A.16.050(1) (justifiable homicide—defense of self or others); 9A.16.050(2) (justifiable homicide—
12 resistance to felony); *see also* 11 Wn. Prac., Pattern Jury Instr. Crim. 16.01-03 (5th Ed).¹

13 RCW 9A.16.040 is relevant to the facts at issue in this inquest, because it establishes an
14 affirmative defense² of Justifiable Homicide to a charge of murder or manslaughter for police officers
15 who use deadly force in the line of duty. *See* 11 Wn. Prac., Pattern Jury Instr. Crim. (WPIC) 16.01
16 (5th Ed) (attached hereto as Exhibit 1).

17 There is an important conceptual distinction between “justifiable homicide” and “excusable
18 homicide,” with respect to moral culpability, albeit not with respect to liability:

19 ¹ Available at
20 <https://govt.westlaw.com/wcrji/Browse/Home/Washington/WashingtonPatternJuryInstructionsCivilCriminal/WashingtonPatternJuryInstructionsCriminal?guid=Ie4edd1c080e511dd92f2cfa545bea09e&bhcp=1&bhhash=1&transitionType=Default&contextData=%28sc.Default%29#Ief9eb0f2e10d11daade1ae871d9b2cbe>

21 ² Not all defenses are “affirmative defenses.” *See State v. W.R., Jr.*, 181 Wn. 2d 757, 762, 336
22 P.3d 1134, 1137 (2014) (“[W]hen a defense necessarily negates an element of an offense, it is *not* a
23 true affirmative defense and the legislature may not allocate to the defendant the burden of proving
the defense.”) *City of Bremerton v. Widell*, 146 Wn. 2d 561, 570, 51 P.3d 733, 737-38 (2002) (same).

1 Justified conduct is correct behavior that is encouraged or at least tolerated. In
2 determining whether conduct is justified, the focus is on the *act*, not the actor. An
3 excuse represents a legal conclusion that the conduct is wrong, undesirable, but that
4 criminal liability is inappropriate because some characteristic of the actor vitiates
5 society's desire to punish him.

6 *Matter of Alden*, 11 Wn. App. 2d 1080 (2020) (quoting 1 Paul H. Robinson, Criminal Law
7 Defenses § 21, at 70 (1984)).

8 *B. There is no legal basis for the Family's incomplete proposal to present only part of the
9 Justifiable Homicide defense to the inquest jury.*

10 The Family proposes to instruct the jury on the relevant subparts of provisions (1) and (2) of
11 RCW 9A.16.040, but not provision (3). *See 10/18/2021 Proposal Submitted by Family of Mr. Butts*
12 (attached hereto as Exhibit 2). **By contrast, the Washington Pattern Jury Instruction makes no
13 distinction between the different provisions of 9A.16.040, and, appropriately, treats them all as part
14 of one, single defense. See Exhibit 1.**

15 The Family's argument for drawing this distinction is that section (3) contains the phrase
16 "criminal liability." Exhibit 2 at 2. **That is a distinction without a difference.** Provision 3 states that a
17 police officer "shall not be held criminally liable for using deadly force without malice and with a
18 good faith belief that such act is justifiable pursuant to this section." RCW 9A.16.040(3). **Although
19 provision 3 happens to use the word "liability," as a legal and logical matter, there is no difference in
20 how these provisions function.** All three provisions define the circumstances in which the officer
21 protected from criminal liability. Indeed, that is the definition of what affirmative defense does—
22 render an unlawful act lawful. *See State v. Decker*, 198 Wn. App. 1024, 2017 WL 1137220, *3 (2017)
23 ("Self-defense is an affirmative defense which can be asserted to render an otherwise unlawful act
24 lawful." (quoting *McBride v. Walla Walla Cty.*, 95 Wn. App. 33, 40, 975 P.2d 1029, 1033 (1999))).

25 More importantly, the Supreme Court has held that it is the duty of an inquest jury to consider
26 questions of criminal liability. It recently explained that "the inquest jury's inquiry encompasses a

Considering evidence of criminal liability is not the same as determining liability.

1 determination of whether the means by which the decedent was killed was criminal. **The jury cannot**
2 **make that determination without evidence pertaining to criminal liability.”** *Butts v. Constantine*, 198
3 Wn. 2d 27, 57, 491 P.3d 132 (2021).

4 C. *There is no legal basis for the Family’s argument that the inquest jury should be narrowly*
5 *restricted to determining probable cause, rather than undertaking a broader inquiry into the*
6 *causes and circumstances of the death*

7 The Coroner’s Act directs that the inquest jury “inquire into the circumstances attending [the]
8 death,” and determine if the “death was occasioned by the act of another by criminal means, who is
9 guilty thereof, if known.” RCW 36.24.040 & RCW 36.24.070. Asking the inquest jury whether an
10 officer used “criminal means” is simply another way of asking **whether the officer acted illegally,**
11 i.e., committed a crime.³ As the Supreme Court explained in *Butts v. Constantine*:

(3) regardless whether IO committed crime can't be held criminally liable. Jury answers first question, PO or criminal jury answers second.

12 The inquest jury swears to inquire into the circumstances attending [the] death under
13 investigation in addition to who the person was, and when, where, and by what means
14 the person died—in other words, in addition to most of the questions answered in the
15 jury’s verdict. The only remaining questions for the jury’s verdict are whether those
16 means were criminal and who is guilty thereof, *which suggests the inquiry into*
17 *attendant circumstances must be broad enough to allow the jury to determine whether*
18 *the killing was a crime.*

19 198 Wn. 2d 27, 56–57, 491 P.3d 132, 149 (2021) (citations and internal quotation marks omitted)
20 (emphasis added).

21 **If an officer’s actions were legally justified based on an affirmative defense, then as a legal**
22 **matter, the officer did not commit a crime. Such a defense is relevant to the inquest jury’s inquiry and**

23 _____
³ A plain language approach to the term “criminal means” as used in the Coroner’s Act helps illustrate why this interpretation is correct. *See, e.g.,* <https://www.macmillandictionary.com/dictionary/american/criminal> 2 (defining “criminal” as “relating to illegal acts”); <https://www.macmillandictionary.com/us/dictionary/american/means> (defining “means” as “a method for doing or achieving something”).

Yes, determine whether the killing was a crime, but not whether it should be held criminally liable.

1 should be presented to it, because the inquest jury must “determine whether the killing was a crime.”

2 *Butts*, 198 Wn. 2d at 57.

3 The Family relies on a footnote in *Butts, id.* at 49 n.5, to argue that the inquest jury should
4 consider *only* the question of whether there is probable cause to support specific criminal charges.
5 Exhibit 2 at 2. However, that single footnote does not provide a basis for so severely limiting the
6 inquest jury’s inquiry. In it, the Supreme Court explains that the inquest “is not a binding adjudication
7 of criminal guilt,” but rather one of the four legally permissible methods for determining probable
8 cause. *Butts*, 198 Wn. 2d at 49 n.5, 491 P.3d at 145 n.5. The Court does not hold, however, that the
9 evidence and instructions submitted to the jury must be limited only to those relevant to probable
10 cause. *Id.*

11 Indeed, the Family’s probable cause argument proves too much. The only legal principles
12 relevant to a probable cause determination are the elements of the crime charged; affirmative
13 defenses, by definition are not relevant, because—as explained above—they do not negate the
14 elements of the crime. *See State v. Fry*, 168 Wn. 2d 1, 7, 228 P.3d 1, 4-5 (2010) (affirming where
15 trial court considered elements of crime at suppression hearing while declining to consider affirmative
16 defense).

17 Strictly limiting the inquest to a determination of probable cause, therefore, would limit the
18 inquest jury to merely a pro forma role. That is because, in most intentional police shootings, and in
19 instances where a victim intentionally kills an attacker in self-defense, it typically will be undisputed
20 that the elements of a crime are met. *See State v. Fry*, 168 Wn. 2d 1, 7, 228 P.3d 1, 4-5 (2010) (“An
21 affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing
22 so.”).

1 As described above, such a result would be inconsistent with the Coroner’s Act and the
2 holdings of *Butts v. Constantine*. It also would be inconsistent with King County authority which fills
3 in the gaps in the Coroner’s Act. King County Executive Order Number PHL-7-1-5-EO provides that
4 “[t]he purpose of the inquest is to ensure a full, fair, and transparent review . . . and to issue findings
5 of fact regarding the facts and circumstances surrounding the death.”

6 Finally, strictly limiting the role of the inquest jury would be unwise as a matter of policy.
7 Evidence that is material to an affirmative defense constitutes exculpatory material under *Brady v.*
8 *Maryland*, 373 U.S. 83 (1963). See also *United States v. Bundy*, 968 F.3d 1019, 1040 & n.8 (9th Cir.
9 2020). Looking to the example of the grand jury, scholars have argued in favor of a fuller presentation
10 of the evidence, including exculpatory evidence, to grand juries in police shooting cases and in all
11 criminal cases, even though prosecutors are not required to present such evidence to the grand jury.⁴
12 Indeed, the United States Department of Justice requires its federal prosecutors to present any
13 exculpatory evidence of which they are aware to a grand jury.⁵

17 ⁴ See, e.g., Kate Levine, *How We Prosecute the Police*, 104 Geo. L.J. 745, 762 (2016) (describing
18 how prosecutors often present exculpatory evidence to grand jury when the suspect is a police officer
19 and arguing that all criminal suspects should be afforded this amount of due process); see also Ric
20 Simmons, *The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases:
21 Restoring the Grand Jury to Its Original Purpose*, 65 Clev. St. L. Rev. 519 (2017) available at
22 <https://engagedscholarship.csuohio.edu/clevstlrev/vol65/iss4/7>

23 ⁵ United States Department of Justice Manual, § 9-11.233, available at
<https://www.justice.gov/jm/jm-9-11000-grand-jury#9-11.233> (“It is the policy of the Department of
Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of
substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor
must present or otherwise disclose such evidence to the grand jury before seeking an indictment
against such a person.”).

1 **II. SPD proposes modest clarifications to the inquest administrator’s proposed criminal**
2 **means jury instruction.**

3 Unlike the Family’s incomplete proposal, the IA’s proposed instruction correctly presents the
4 entirety of the affirmative defense to the inquest jury. SPD requests only one significant edit, which
5 is to move the language from RCW 9A.16.040(3) regarding mental state out of the instruction that
6 defines “justifiable” and into the instruction that defines “criminal means.” SPD’s requested edits to
7 the IA’s proposed jury instruction are attached hereto as Exhibit 3. The purpose of this edit is to avoid
8 confusion and to more closely follow the structure of RCW 9A.16.040 and the plain language
9 meaning of the phrase “criminal means.”

10 RCW 9A.16.040 defines when police officers who use deadly force are entitled to invoke the
11 affirmative defense of Justifiable Homicide. Provisions 1 and 2 of RCW 9A.16.040 establish an
12 objective test for determining when a homicide that results from a police officer’s use of deadly force
13 is “justifiable.” *See* RCW 9A.16.040(1) (“Homicide or the use of deadly force is justifiable in the
14 following cases . . .”); 9A.16.040(2) (further defining when force is justifiable under subpart (1)(c)).

15 In contrast, provision 3 is not concerned with defining when a homicide is “justifiable,” but
16 rather adds a subjective mental state requirement for the imposition of criminal liability. That is, even
17 if a homicide does not meet the objective test for whether it is “justifiable,” provision 3 still may be
18 a defense. It states: an “officer shall not be held criminally liable for using deadly force without malice
19 and with a good faith belief that such act is justifiable” RCW 9A.16.040(3). Provisions 1-3
20 operate together to define when a police officer can invoke the affirmative defense.

21 While provision 3 is not relevant to the instruction regarding “justifiable,” it is relevant to the
22 instruction regarding “criminal means.” As explained above, asking the inquest jury whether an
23 officer used criminal means is simply another way of asking whether the officer committed a crime.
If the officers are entitled to the Justifiable Homicide defense, then, as a legal matter, it means that

1 they did not commit a crime. Accordingly, the mental state requirement of RCW 9A.16.040(3) should
2 be included in the definition of criminal means.

3 In addition to providing an accurate explanation of “criminal means,” SPD’s proposed edit
4 makes it clear, in accordance with the structure of the statute, that the jury is to undertake a two-step
5 inquiry. First, the jury applies the objective test established by provisions 1 and 2 to determine if the
6 homicide was justifiable. Second, if the jury determines that the homicide was not justifiable, then
7 and only then does the jury proceed to the subjective mental state test in provision 3, in order to
8 determine if the officer is nonetheless entitled to the defense (i.e., to determine if the officer used
9 criminal means).

10 To the extent that the IA does not make this requested change, then SPD asks, in the
11 alternative, that the IA’s proposed instruction number 1 be modified for clarity. *See* Exhibit 3 at 2.
12 The way that the IA’s proposed instruction combines provisions 1 and 3 of 9A.16.040 into one
13 instruction, with provision 3 inserted in the middle of the language from provision 1, is convoluted
14 and risks confusing the jury.

15 SPD’s remaining requested edits are self-explanatory as they replicate language from RCW
16 9A.16.040 and King County Ordinance 19116. *See generally* Exhibit 3 at 1-2.

17 CONCLUSION

18 For the foregoing reasons, SPD respectfully requests that the IA implement its requested
19 revisions in Exhibit 3 and deny the Family’s incomplete proposal to instruct the inquest jury.

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21 DATED this 2nd day of November, 2021.

22 PETER S. HOLMES
23 Seattle City Attorney

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CERTIFICATE OF SERVICE

I certify that on the 2nd day of November, 2021, I caused a true and correct copy of this document to be served on the following in the manner indicated below:

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