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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
RESPONSE TO FAMILY'S BRIEF
ADDRESSING CRIMINAL MEANS JURY
INSTRUCTION

The City of Seattle, through the Seattle Police Department (hereinafter, "SPD"), hereby submits its response to the brief of the family of Damarius Butts (hereinafter, "Family").

INTRODUCTION

SPD objects to the Family's argument and proposed jury instructions, 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 or ethical basis for withholding exculpatory information (i.e., legal instruction on the elements of an affirmative defense) from the inquest jury.

1 **ARGUMENT**

2 **I. The Family’s argument in Part II of its brief misreads the Supreme Court’s ruling in**
3 ***Butts v. Constantine*, seeks to advise the jury on an inaccurate and incomplete version**
4 **of the Justifiable Homicide defense, and would not result in a full, fair, and**
5 **transparent review.**

6 The Family proposes to instruct the jury on only part of the Justifiable Homicide defense:
7 provisions (1) and (2) of RCW 9A.16.040, which together establish an objective test for “justifiable.”
8 But the Family would withhold instruction on provision (3)—which adds a mental state component
9 to the defense. *See* Exhibit 2 to SPD’s Brief. Specifically, provision 3 states that a police officer
10 “shall not be held criminally liable for using deadly force without malice and with a good faith belief
11 that such act is justifiable pursuant to this section.” RCW 9A.16.040(3).

12 As explained in SPD’s initial brief, there is no legal basis for the Family’s proposal. The
13 Washington Pattern Jury Instruction makes no distinction between the different provisions of
14 9A.16.040, and, appropriately, treats them all as part of one, single defense. *See* Exhibit 1 to SPD’s
15 Initial Brief.

16 The Family’s argument for drawing this distinction is that section (3) contains the phrase
17 “criminal liability.” Exhibit 2 to SPD’s Initial Brief at 2. That is a distinction without a difference.

18 As detailed in SPD’s Initial Brief at pages 3-6, and as the Supreme Court explained in *Butts*
19 *v. Constantine*, although the inquest jury does not render “a binding adjudication of criminal guilt,”
20 198 Wn. 2d at 49 n.5, 491 P.3d at 145 n.5, nonetheless it is the duty of the inquest jury to consider
21 questions of criminal liability. The Supreme Court explained, “the inquest jury’s inquiry
22 encompasses a determination of whether the means by which the decedent was killed was criminal.
23 The jury cannot make that determination without evidence pertaining to criminal liability.” *Id.* at 57;
see also id. at 56-57 (“The only remaining questions for the jury’s verdict are whether those means

1 were criminal and who is guilty thereof, *which suggests the inquiry into attendant circumstances*
2 *must be broad enough to allow the jury to determine whether the killing was a crime.*” (citations and
3 internal quotation marks omitted) (emphasis added).

4 Asking the inquest jury whether an officer used “criminal means” is simply another way of
5 asking whether the officer acted illegally, i.e., committed a crime.¹ If an officer’s actions were legally
6 justified based on an affirmative defense, then as a legal matter, the officer did not commit a crime.
7 Such a defense is relevant to the inquest jury’s inquiry.

8 The Family relies on a footnote in *Butts v. Constantine, id.* at 49 n.5, to argue that the inquest
9 jury should consider *only* the question of whether there is probable cause to support specific criminal
10 charges. Exhibit 2 to SPD’s Initial Brief at 2. However, that single footnote does not provide a basis
11 for so severely limiting the inquest jury’s inquiry. To the contrary, the passages from the opinion
12 quoted above make it clear that the inquiry is broader.

13 Moreover, strictly limiting the inquest to a determination of probable cause would limit the
14 inquest jury to merely a pro forma role. In intentional police shootings it typically is undisputed that
15 a homicide has been committed. Therefore, the only substantive question for the inquest jury is
16 whether the homicide was justifiable—i.e., whether the officers are entitled to the affirmative defense
17 of Justifiable Homicide. *See State v. Fry*, 168 Wn. 2d 1, 7, 228 P.3d 1, 4-5 (2010) (“An affirmative
18 defense admits the defendant committed a criminal act but pleads an excuse for doing so.”).

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21 ¹ A plain language approach to the term “criminal means” as used in the Coroner’s Act
22 helps illustrate why this interpretation is correct. *See, e.g.,*
23 <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”).

1 In addition, it would be inappropriate to withhold exculpatory information from the inquest
2 jury, and it would result in the opposite of a full, fair, and transparent review. This fact becomes
3 especially clear when considering another setting that involves determinations of probable cause: the
4 grand jury and the prosecutor’s role in presenting evidence to a grand jury and advising the grand
5 jury on the law. Looking to the example of the grand jury, both the National District Attorney’s
6 Association and the United States Department of Justice take the position that ethical considerations
7 compel prosecutors to present exculpatory circumstances of which they are aware to a grand jury.²

8 **II. The Family’s proposal to present the elements of four distinct crimes lacks an
9 evidentiary basis.**

10 Traditionally, the inquest jury has not been asked whether the facts establish the elements of
11 specific crimes. *See, e.g.*, Exhibits 4-6 (attached hereto). If the Inquest Administrator (IA) is going
12 to depart from precedent and instruct the inquest jury as to the elements of any crime, then the jury
13 should be instructed only as to specific crimes for which the IA believes there is an evidentiary basis.
14 Instructing the jury on the law of crimes for which there the IA is no adequate evidentiary basis
15 would be improper.

16
17 ² *See* National Prosecution Standards (3rd Ed.) of the National District Attorney’s Association
18 available at <https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf>
19 (“[A] prosecutor appearing before a grand jury . . . [s]hould recommend that a grand jury not indict
20 if the prosecutor believes that the evidence presented does not warrant an indictment under governing
21 law, and he or she should encourage members of the grand jury to consider the fact that sufficient
22 evidence must exist to enable the prosecutor to meet the state’s burden of proof at trial”); United
23 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.”); *id.* at 9-11.010
 (“The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its
consideration. In discharging these responsibilities, the prosecutor must be scrupulously fair to all witnesses
and must do nothing to inflame or otherwise improperly influence the grand jurors.”).

1 **III. SPD agrees with the position taken in the Involved Officers' Response Brief.**

2 SPD agrees that the best course of action is to follow precedent and not to present specific
3 crimes and their elements to the inquest jury. The Supreme Court in *Butts v. Constantine* did not
4 indicate that it was altering the nature of the inquest jury's role in make a probable cause
5 determination. Accordingly, the inquest jury can continue to answer a series of questions that provide
6 the factual predicates for the questions of criminal means and probable cause. *See, e.g.*, Exhibits 4-6.

7 **CONCLUSION**

8 For the foregoing reasons, SPD respectfully requests that the IA implement its requested
9 revisions and deny the Family's incomplete proposal to instruct the inquest jury.

1 DATED this 8th day of November, 2021.

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CERTIFICATE OF SERVICE

I certify that on the 8th 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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