KING COUNTY DEPARTMENT OF EXECUTIVE SERVICES INQUEST PROGRAM

IN RE INQUEST INTO THE DEATH OF DAMARIUS D. BUTTS .	No. 517IQ8013 CITY'S BRIEF REGARDING PROPRIETY OF ADVERSE INFERENCE INSTRUCTION

The Inquest Administrator asked the parties to provide briefing as to whether the inquest jury should be provided an instruction allowing them to draw an adverse inference based on the involved officers' stated intentions to invoke their rights not to answer questions under the Fifth Amendment. The City of Seattle hereby submits this brief.

ARGUMENT

I. The Washington Supreme Court did not address or resolve this issue in *Butts v. Constantine*.

The Inquest Administrator asked that the parties' briefs address the following statement in *Butts v. Constantine*: "[I]n noncriminal proceedings like coroner's inquests, the 'only way the privilege can be asserted is on a question-by-question basis.'" *Fam. of Butts v. Constantine,* 198 Wn.

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2d 27, 64, 491 P.3d 132, 152 (2021) (quoting *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1263 (9th Cir. 2000)).

SPD does not interpret the Washington Supreme Court to be holding that coroner's inquests are "noncriminal" in every aspect and for all purposes under the Fifth Amendment.[1] Rather, the Court was addressing a specific question presented to it: are involved officers entitled to "blanket immunity from testifying in coroner's inquests." *Butts v. Constantine*, 198 Wash. 2d at 63. Regarding this question, the Court held that a potential criminal defendant in a coroner's inquest must invoke the Fifth Amendment on a question-by-question basis. But that does not mean the Court concluded that an inquest which determines criminal probable cause is exactly like a civil lawsuit.

Inquests are quasi-judicial proceedings, not civil suits. The Supreme Court acknowledged this the fact in *Butts v. Constantine*. It held, "[t]he 2020 EO commands the inquest administrator to instruct the inquest jury "that it may not comment on fault ... such as ... the criminal or civil liability of a person." *Family of Butts v. Constantine*, 198 Wn.2d 27, 48, 491 P.3d 132 (2021); *accord In re Boston*, 112 Wn. App. 114, 117, 47 P.3d 956, 957 (2002) ("inquest proceedings are purely advisory, nonadversarial proceedings designed to help the coroner determine the cause of death."). By expressly precluding an inquest jury from commenting on fault or civil liability, the Supreme Court, like the Court of Appeals, has made clear these proceedings are not "civil suits." Indeed, in *Butts*, the Court described the Administrator as a "quasi-judicial decisionmaker," which further cuts against

[1] Such an interpretation would ignore the fact that, at numerous places throughout its opinion the Supreme Court explicitly describes the inquest as a criminal probable cause determination, making it clear that the inquest is not purely civil in nature. *Fam. of Butts v. Constantine*, 198 Wash. 2d 27, 48 (2021) ("the jury must determine whether the means by which someone was killed was, in fact, criminal"); *id.* at 49 n.5 (2021) ("an inquest is one of four established, recognized and legally permissible methods for determining the existence of probable cause. . . . [T]he inquest jury's verdict . . . remains a type of probable cause determination.").

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any argument that an inquest is a civil suit. *Id. at* 63 ("…we presume quasi-judicial decision-makers such as Administrator Spearman act fairly in performing their duties, absent any evidence to the contrary"). The logical conclusion from that holding is that inquests are quasi-judicial proceedings, not civil suits.

While the Supreme Court's question-by-question ruling in *Butts v. Constantine* is consistent with precedent in civil cases, it also accords with Ninth Circuit precedent regarding criminal probable cause proceedings. *See United States v. Benjamin*, 852 F.2d 413, 420 (9th Cir.1988) (no misconduct where prosecutor "test[ed] validity of the defendants' reliance on their constitutional right to remain silent" through questioning before grand jury), *vacated on other grounds*, 490 U.S. 1043 (1989).

For all these reasons, it would be a leap to conclude that the Washington Supreme Court ruled *sub silentio* in *Butts v. Constantine* on a legal question that was not presented to it.

II. The Involved Officers should not be sanctioned for invoking their Fifth Amendment Rights through an adverse inference instruction to the jury.

The Administrator requested briefing on whether the inquest jury should be instructed to draw an adverse inference from the fact that the involved officers invoked the Fifth Amendment in response to certain questions. SPD was unable to locate a Washington case directly on point. As noted above, one purpose of a coroner's inquest is to identify "any actors who may be criminally liable for the death. *Fam. of Butts v. Constantine*, 198 Wash. 2d 27, 42 (2021). In addition, under Washington law, "an inquest is one of four established, recognized and legally permissible methods for determining the existence of probable cause." *Id.* at 49 (internal quotation marks omitted). Therefore, the inquest is not purely a civil proceeding. To elaborate, simply because a proceeding is not a criminal trial, that does not mean it is a civil proceeding within the meaning of the Fifth Amendment. For example, the

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Ninth Circuit and other circuits have determined that, for purposes of Fifth Amendment analysis,[2] the phrase "criminal case" includes not only criminal trials but also the process of filing formal changes. *See Stoot v. City of Everett*, 582 F.3d 910, 925 (9th Cir. 2009); *accord Mitchell v. United States*, 526 U.S. 314, 320-21 (1999) (same as to sentencing hearings); *Vogt v. City of Hays, Kansas*, 844 F.3d 1235, 1239-40 (10th Cir. 2017) (same as to probable cause hearings, contains discussion of circuit split on this issue). In sum, it is not clear whether the standards for giving an adverse inference instruction in civil cases should be applied here.

Here, however, the Administrator does not have to resolve this issue. That is because applying the test for giving an adverse inference instruction in a civil case leads to the conclusion that no such instruction should be given.

Even in a purely civil setting, the determination of whether an adverse inference should be given involves a fact-intensive balancing inquiry, which takes into account the purpose and stakes of the proceeding and the importance of the Fifth Amendment rights. *See Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1265 (9th Cir. 2000) ("In each particular circumstance, the competing interests of the party asserting the privilege, and the party against whom the privilege is invoked must be carefully balanced."). At least two important factors emphasized by the Ninth Circuit in *Glanzer* point against an adverse inference here.

First, an "adverse inference can only be drawn when independent evidence exists of the fact to which the party refuses to answer." *Id.* at 1264. Here, it is likely that voluminous evidence in the form of ICV, audio recordings, forensic analysis, and the corroborative testimony of numerous

[2] The Fifth Amendment provides: "No person . . . shall be compelled in any *criminal case* to be a witness against himself" (emphasis added).

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officers and civilian witnesses will be available to rebut any adverse inference that the Family may propose.

Second, "the tension between when to allow the adverse inference, and when not to allow it, stems from the consideration that . . . , in a civil proceeding, 'the parties are on a somewhat equal footing.'" *Id.* Here, the parties are not on equal footing; for example, the Administrator has subpoena power and the involved officers' do not, thus leading to exclusion of at least one witness whom the officers wish to present.

Third, the interest of the party asserting the privilege are very weighty. Here, the interests at stake for the involved officers is the question of whether the jury finds probable cause that they be criminal charged. *See Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1265 (9th Cir. 2000) ("In each particular circumstance, the competing interests of the party asserting the privilege, and the party against whom the privilege is invoked must be carefully balanced."); *see also id.* ("Under certain circumstances, within the civil framework, because of the constitutional nature of the right implicated, an adverse inference from an assertion of one's privilege not to reveal information is too high a price to pay.").

In addition, there is Ninth Circuit precedent indicating that, in a federal probable cause proceeding, the grand jury should be instructed *not* to make an adverse inference based on invocation of the Fifth Amendment privilege. *See United States v. Benjamin*, 852 F.2d 413, 421 n.7 (9th Cir. 1988), *rev'd on other grounds*, 490 U.S. 1043, (1989) ("Courts have recommended, but not required, that the prosecutor instruct the grand jury to draw no adverse inferences from assertions of privilege…. Where, as here, the prosecutor repeatedly elicited assertions of privilege, some cautionary instructions would have been appropriate.").

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III. Use of the involved officers' *Garrity* statements at the inquest may present later issues.

The City understands that, in light of the involved officers' intentions to invoke their Fifth Amendment rights, the Inquest Administrator plans to play the audio recordings of their *Garrity* statements to the inquest jury. The City would note that such use of the statements potentially could raise another, related issue under the Fifth Amendment. Because a coroner's inquest is one form of probable cause determination under Washington state law, use of an involved officers' *Garrity* statements in an inquest theoretically could potentially present a hurdle for the prosecutor if there were to be a subsequent criminal proceeding based on an inquest jury's finding of probable cause. *Stoot v. City of Everett*, 582 F.3d 910, 925 (9th Cir. 2009) (For purposes of Fifth Amendment analysis, "[a] coerced statement has been 'used' in a criminal case when it has been relied upon to file formal charges against the declarant"); *In re Grand Jury Subpoena*, 75 F.3d 446, 448 (9th Cir. 1996).

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CERTIFICATE OF SERVICE

I certify that on the 11th day of March, 2022, 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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