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KING COUNTY DEPARTMENT OF
EXECUTIVE SERVICES INQUEST PROGRAM

Inquest into the death of
CURTIS ELROY TADE

No. 17IQ 61739

CITY MEMORANDUM RE: JURY
INSTRUCTIONS

I. INTRODUCTION

The Inquest Program Attorney on behalf of the Inquest Administrator have proposed two sets of jury instructions. The Inquest Administrator requested briefing on three issues discussed at the January 6, 2023 Pre-Hearing Conference, only one of which required the Kirkland Police Department (“the Department”) to file an opening brief. The Department will now address the opening and closing jury instructions. The two other issues will be addressed in a responsive brief.

II. LEGAL ANALYSIS

A. The Format of Opening Instructions and Case Summary

The Department finds the *Opening Instructions* to be fair and measured and has very few objections. (The issue of Tade and Scrivens being “married” has been addressed, as has whether Mr. Tade failed to comply with commands.) However, the Department believes that the format and organization of the *Opening Instructions* should be slightly revised.

Logically and legally the preliminary instructions should appear first, followed by the statement of the case, and lastly the family statement. This would provide the panel with

1 some context for what they are hearing, set out the facts and then more fully describe one
2 participant in the incident. Doing otherwise places significant emphasis on Mr. Tade.

3 Additionally, the Department strongly objects to the proposed Family Statement and
4 would request an opportunity to address the inappropriate contents contained therein. For
5 example, the Tade Family Statement claims that Tade was “murdered,” and that the Campos
6 family are “unsavory characters” who Tade referred to as “animals.” Further, it states that
7 Tade died “on a cold rainy December day, bleeding out his life blood, into the storms drains
8 of the property[.]” None of this is appropriate.

9 **B. Additions to Closing Jury Instructions.**

10 **1. Assault Definition Instructions**

11 The Department proposes charging the panel with the following instructions.¹

12 ***Instruction No. 14***

13 An assault is ~~also~~ an act, with unlawful force, done with the intent to create
14 in another apprehension and fear of bodily injury, and which in fact creates in
15 another a reasonable apprehension and imminent fear of bodily injury even
16 though the actor did not actually intend to inflict bodily injury.

16 WPIC 35.50 Assault-Definition

17 _____
18 ¹ The Department quoted the entire instruction in the draft *Closing Instructions* so that the parties
19 may see how the pattern instruction fits different fact patterns. The *first two paragraphs* would not
20 apply here:

21 *An assault is an intentional touching or shooting of another person, with unlawful
22 force, that is harmful or offensive regardless of whether any physical injury is
23 done to the person. A touching or shooting is offensive if the touching or shooting
24 would offend an ordinary person who is not unduly sensitive.*

25 *An assault is also an act, with unlawful force, done with intent to inflict bodily
26 injury upon another, tending but failing to accomplish it and accompanied with
27 the apparent present ability to inflict the bodily injury if not prevented. It is not
28 necessary that bodily injury be inflicted.*

29 An assault is also an act, with unlawful force, done with the intent to create in
30 another apprehension and fear of bodily injury, and which in fact creates in
31 another a reasonable apprehension and imminent fear of bodily injury even though
32 the actor did not actually intend to inflict bodily injury. WPIC 35.50 Assault-
33 Definition

1 ***Instruction No. 15***

2 A person commits the crime of assault in the third degree when he or she
3 assaults a law enforcement officer or other employee of a law enforcement
4 agency who was performing his or her official duties at the time of the
5 assault.

6 WPIC 35.20 Assault-Third Degree-Definition.

7 These instructions are needed because proposed Instruction No. 11 provides in part:
8 “A death caused by an officer’s use of deadly force is justifiable when necessarily used by
9 the officer to arrest or apprehend a person who the officer reasonably believes *has*
10 *committed, or attempted to commit, a felony.*” But, there is no discussion of what that
11 “felony” might be, leaving the panel to speculate or come up with their own definition.
12 Likewise Proposed Instruction No. 13 defines “probable cause.” This begs the question
13 probable cause for what? And most significantly, proposed Instruction No. 16 states “The
14 crime of assault with a deadly weapon is a felony.” But “assault” is not defined; it should be.

15 The relevant statute provides:

16 Homicide or the use of deadly force is justifiable in the following cases:
17 When necessarily used by a peace officer meeting the good faith standard of
18 this section or person acting under the officer's command and in the officer's
19 aid: To arrest or apprehend a person who the officer reasonably believes has
20 committed, has attempted to commit, is committing, or is attempting to
21 commit a felony[.]

22 RCW 9A.16.040(1)(c)(i).

23 Case law likewise supports this conclusion.

24 Deadly force is necessary only if the officer has probable cause to believe
25 that the suspect ‘poses a threat of serious physical harm to the officer or a
26 threat of serious physical harm to others.’ RCW 9A.16.040(2). Such a
27 threat may exist if the suspect threatens the officer with a weapon or if the
28 officer has probable cause to believe that the suspect has committed any
29 crime involving the infliction or threatened infliction of serious physical
30 harm. RCW 9A.16.040(2)(a) and (b).

31 *State v. Kray*, 114 Wn. App. 1052, *review denied*, 114 Wash.App. 1052, *cert. denied*, 541
32 U.S. 963 (2004). “We judge the ‘reasonableness’ of a particular use of force from the
33 perspective of a reasonable officer on the scene, not ‘20/20 hindsight.’ It is a ‘standard of the

1 moment' because 'police officers are often forced to make split-second judgments in tense,
2 uncertain, and rapidly evolving circumstances.'" *Id.* (citation omitted).

3 The panel would be aided by a definition of assault as the law and policy take into
4 account the subject's criminal actions, and the fact that Tade pointed a loaded assault rifle at
5 a police officer, thereby committing the felony crimes of assault with a deadly weapon, and
6 assault of a police officer.

7 **2. Justifiable Homicide Instruction**

8 The Department joins in the Involved Officer's request for a revision to this
9 instruction.

10 **3. Other Related Instructions**

11 The Department joins in the Involved Officer's request for the addition of
12 instructions regarding officer's general duties, no duty to retreat, and acting on appearances.

13 DATED: January 13, 2023

14 KEATING, BUCKLIN & McCORMACK, INC., P.S.

15 By: /s/ Stewart A. Estes

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the below date, a true and correct copy of the foregoing document was served upon the parties listed below via the method indicated:

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DATED this 13th day of January, 2023, at Seattle, Washington.

/s/ Teresa A. Caceres
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