

NO. _____

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) ____ JUDICIAL DISTRICT
JOE SMITH) BEXAR COUNTY, TEXAS

**MOTION TO ORDER THE STATE TO PRESENT ALL
EXCULPATORY EVIDENCE IN ITS POSSESSION
TO THE BEXAR COUNTY GRAND JURY**

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves this Court to order the State of Texas to present all exculpatory evidence in its possession to the Bexar County Grand Jury, and for good cause, shows the following:

I.

Counsel believe that the Bexar County District Attorney will present evidence to the Bexar County Grand Jury on this date concerning a shooting on August 1, 2016 involving Deputy Joe Smith and Deputy Robert Brown.

II.

It is the duty of the attorney representing the state to inform the grand jury "of offenses liable to indictment," to examine witnesses before the grand jury, to advise the grand jury as to the proper mode of interrogating these witnesses, and to advise the grand jury upon matters of law relating to the case before it. TEX. CODE CRIM. PROC. arts. 20.03, 20.04, 20.05.

III.

It is the duty of the grand jury to "diligently inquire into" matters, TEX. CODE CRIM. PROC. art. 19.34, and to vote as to the presentment of an indictment "[a]fter *all the testimony which is accessible* to the grand jury shall have been given in respect to any criminal accusation. . . ." TEX. CODE CRIM. PROC. art. 20.19 (emphasis supplied).

IV.

Texas prosecutors have the duty to seek justice, and may not suppress facts or secret witnesses "capable of establishing the innocence of the accused." TEX. CODE CRIM. PROC. art. 2.01. The Texas Constitution guarantees that "no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury." TEX. CONST. Art. I, § 10; *See also* TEX. CODE CRIM. PROC. art. 1.05. We submit that the Texas Constitution and Texas law impose on Texas prosecutors at least a limited duty to present exculpatory evidence to a Texas grand jury before seeking an indictment *See In re Grand Jury Proceedings 198.GJ.20*, 129 S.W. 3d 140, 145 (Lopez, C.J., dissenting).

V.

Our District Attorney has properly announced that a correct analysis of this case will require consideration of the totality of circumstances. That should also be true at the grand jury level, and such an analysis must necessarily include all the exculpatory evidence in the state's possession. And there is substantial exculpatory evidence in this case. Among other things:

- Deputies Smith and Brown were dispatched to investigate a 911 call reporting domestic violence. Any call for domestic violence is fraught with danger, but in this case the danger was palpable. It was reported that a husband and father had beaten his wife about the head and had blackened the eye of his infant child. And he was armed with a knife. Presumably all 911 calls made in this case have been preserved and are in the state's possession. If so, these recordings should capture the spontaneous words and thoughts of the callers, and this evidence could be highly probative of the present danger posed by a violent, armed person, not only to his own family, but also to responding police officers. Additionally, such recordings might well have recorded in the background words and threats made by the deceased himself. The prosecutors presenting this case should be required to play any and all 911 calls generated in this case to the grand jurors, so they can hear and understand the fear the deceased's own family felt from him moments before he was shot.
- If the prosecutors obtained written or videotaped statements from the deceased 's family members concerning the violent incident that motivated the 911 calls, all those statements should be provided to the grand jury.
- If anyone in the deceased's household was injured, any photographs depicting those injuries, any medical records concerning the injuries, and any statements describing the injuries, should be made available to the grand jury, because such evidence, if it exists, would provide probative evidence of the deceased's capacity for violence.
- The media has reported and played radio traffic recordings which confirm that the deceased was threatening "suicide by cop." These recordings show that the deceased was a violent man armed with a deadly weapon and he had a death wish, and the grand jury, which must evaluate the reasonableness of the deputies's actions, needs to hear these recordings.
- It is typical for law enforcement agencies to record conversations between dispatchers and officers on the scene, and officers en route to the scene, including senior officers tasked with supervision. If there are recordings of supervisors or other officers instructing or advising Deputies Smith or Brown to take certain actions, those should be played for the grand jury, because they will be probative of the states of mind of the two officers involved.
- Firefighters from the Leon Valley Volunteer Fire Department are reported to have staged in the area and likely saw and heard some of the verbal threats made by the deceased and some of his aggressive behavior, as well as the deputies's responses. Any recordings that capture the relevant words of these observers, or any written or

recorded statements they made to investigators, should be provided to the grand jury.

- One brief videotape has been widely shown in the media. It is reported that another videotape exists, and that this shows details not shown in the other. All videotapes in the state's possession should be played for the grand jurors in their entirety and any written transcriptions of the words exchanged between the two deputies and the deceased should also be provided to the grand jurors.
- Both deputies gave written statements to Sheriff's Office investigators on the day of the incident recounting what they experienced, the aggression and danger they encountered, and why they felt it immediately necessary to take the actions they took. If the prosecutors contend these statements were legally obtained and that they will be admissible in court before a petit jury should a true bill be presented, they should present the statements, in their entirety, to the grand jury, before the indictment is voted on.
- It is routine for toxicological examinations to be performed on deceased persons by the Bexar County Medical Examiner's Office. The prosecutors presenting this case should inform the grand jurors of any toxicological evidence obtained, accompanied by testimony of qualified toxicologists who can speak authoritatively of the combined effects of any substances found in the deceased that could have contributed to his violent and erratic behavior the day he died.
- It has been reported in the media that the deceased has a history of using deadly weapons to threaten and commit violent behavior against other persons, including peace officers, and that he has been convicted of aggravated assault against a public servant and aggravated robbery, and has served prison sentences for both offenses. All accurate information about the deceased's history of violence that is known to the prosecutors - whether adjudicated or not - should be disclosed to the grand jury.

VI.

Citizens in Texas, even peace officers, have the right to defend themselves against deadly attack. The prosecutors who present this case must fairly explain the laws of self-defense, deadly force in defense of person, defense of third person, and arrest and search, as provided by §§ 9.31, 9.32, 9.33 and 9.51 of the Texas Penal Code. Among other things, the

grand jury should be instructed - just as a Texas petit jury would be - that:

- a person, including a peace officer, is entitled to protect himself and others against *both the use and the attempted use* of unlawful deadly force;
- a person, including a peace officer, is entitled to protect himself and others from *apparent danger* as fully and to the same extent as he would had the danger been real, provided that he acted upon a reasonable apprehension of danger, as it appeared to him from his standpoint at the time, and that he reasonably believed such deadly force was immediately necessary to protect himself against the use or attempted use of unlawful deadly force by his assailant.
- when determining the existence of real or apparent danger, it is the jury's duty to consider all of the facts and circumstances in the case in evidence before it, and all relevant facts and circumstances surrounding the killing, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the killing, and to consider the words, acts, and conduct of the deceased at the time of and prior to the time of the killing, and to consider whatever threats, if any, the deceased may have made to the defendant and consider any difficulty or difficulties which he had had with the accused.
- When considering all the above, the jury must place itself in accused's position and view the circumstances from his standpoint alone, at the time in question.
- When raised by the evidence, it is the prosecutor's burden to prove beyond a reasonable doubt that the accused was not justified in defending himself and others, and if the prosecutor fails to meet its burden of proof, the jury must find the accused not guilty.

VII.

In the last two years a spate of highly publicized officer-involved deaths has flooded this country. Names and places like Ferguson, Michael Brown, Freddie Gray, and Tamir Rice, have become part of the national vocabulary. At this very moment a police officer is on trial in Baltimore. Immediately after the incident involving Deputies Smith and Brown, the claim of a United States Congressman was reported in the San Antonio media, that "the

encounter is extremely disturbing as it appears to show an unarmed man with his hands up being shot by a deputy." Positive proof now exists that the Congressman was in error: the deceased was in fact not unarmed at all, but rather was brandishing a knife when shot. Very recently, in a highly publicized case, a Chicago police officer was arrested for first degree murder. Despite attempts by the local media to find similarity between that case and ours, nothing could be further from the truth. There, according to the media, a single police officer jumped from his vehicle, and within six seconds fired a multitude of shots, striking an unarmed person from the front and back, and causing his death. In our case, in marked contrast, two officers almost simultaneously fired a single shot apiece that struck the front of a man who was then armed with a knife, and who had just minutes before attacked his wife, his 18-day old baby, and one of the officers with the knife and a variety of other weapons. The man had a history of violence against people and police officers, and had repeatedly told anyone who would listen that he would die before returning to prison. All the available evidence shows that Deputies Joe Smith and Robert Brown did everything in their power to avoid shooting the deceased, and only shot him in lawful defense of themselves and others after every other possible course of action was foreclosed by the lawless actions of the dead man. Whatever the evidence eventually shows about the officer in Chicago, and other officers charged with on-duty shootings, Joe Smith and Robert Brown committed no crime. In light of the charged and prejudicial atmosphere that exists everywhere in the United States today, it is all the more important that a case like this one

be fairly presented to the grand jury, and fairness requires that the jury hear all the exculpatory evidence known to exist.

VIII.

While abundant evidence exists that Deputies Smith and Brown are innocent, it will do them little good if not presented to the grand jury that considers their indictments. Regardless of the final outcome of this case, the mere fact of an indictment will cause irreparable harm. These long time lawmen will almost certainly be terminated from their positions at the Sheriff's Office without pay. It is unlikely they will be able to find meaningful employment pending trial. Threats were reported against police officers in the aftermath of this shooting, and it is reasonable to expect that the danger to these deputies will intensify if there is an indictment. It is only right that the Bexar County District Attorney's Office be required to present to the grand jury all the exculpatory evidence it possesses.

IX.

It is unknown whether the state intends to present any or all of its exculpatory evidence to the grand jury that will consider this case. If it does not, it will violate Mr. Smith's rights to due process and due course of law, guaranteed by the Texas and United States Constitutions, as well as articles 2.01, 19.34, and 20.19, by failing to present exculpatory evidence to the grand jury before it deliberates and reaches a decision whether to indict or not.

X.

This Court should order the Bexar County District Attorney to present all the exculpatory evidence in its possession to the grand jury investigating this case. The Court should further order the District Attorney to seal its entire file and provide a copy of it for this Court to review to determine what exculpatory evidence is in the state's possession at the time it seeks an indictment against Mr. Smith and Mr. Brown. Finally, the Court should order that the state's entire presentation to the grand jury be electronically recorded so that, if a true bill is presented, this Court and others can insure that all the exculpatory evidence was properly supplied to the indicting grand jury, as required by law.

Respectfully submitted:

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of this motion was served on the Bexar County District Attorney's Office; 101 W. Nueva; San Antonio, TX 78205 on September 1, 2016.

MARK STEVENS

ORDER

On this the ____ day of _____, 2018, came to be considered Motion To Order The State To Present All Exculpatory Evidence In Its Possession To The Bexar County Grand Jury, and said motion is hereby

(GRANTED)

(DENIED)

JUDGE PRESIDING