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6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
7 IN AND FOR THE COUNTY OF SPOKANE

8 The Estate of JOSHUA MUSSELMAN,
9 deceased; SARA BERNTGEN, individually and
10 as Personal Representative of the Estate; KYRA
11 BABINSKI, individually; and WILLIAM
MUSSELMAN, individually,

12 Plaintiffs,

13 vs.

14 CITY OF SPOKANE, a political subdivision of
15 the State of Washington; GARTH CRAIGEN,
16 individually and in his official capacity;
17 DANIEL VALENCIA, individually and in his
18 official capacity; MATHEW STEWART,
19 individually and in his official capacity; WILL
20 MITCHELL, individually and in his official
21 capacity; STATE OF WASHINGTON BY
22 AND THROUGH ITS DEPARTMENT OF
23 CORRECTIONS; STATE OF WASHINGTON
24 BY AND THROUGH ITS DEPARTMENT OF
25 SOCIAL AND HEALTH SERVICES;
26 COUNTY OF SPOKANE, a political
27 subdivision of the State of Washington;
FRONTIER BEHAVIORAL HEALTH, a
Washington Nonprofit Corporation; AND
DOES 1-40, individually and in their official
capacities, inclusive.

Defendants.

Case No. 26-2-00473-32

PLAINTIFFS' RESPONSE TO
DEFENDANT CITY OF SPOKANE, et al,
MOTION TO AMEND ANSWER TO
PLAINTIFFS' COMPLAINT AND
AFFIRMATIVE DEFENSES

26 Comes now, the Plaintiffs, the Estate of Joshua Musselman, Autumn Smith, Sara

27 PLAINTIFF'S RESPONSE TO
DEFENDANTS MOTION TO AMEND
ANSWER

- 1

Meyer Thorp Attorneys at Law, PLLC
P.O. BOX 87
Spokane, WA 99210
(509) 533-1511 Fax (509) 343-3366

1 Berntgen, Kyra Babinski, and William Musselman, by and through their attorneys, David
2 Turplesmith and Rondi Thorp, Meyer Thorp Attorneys at Law, PLLC, with the Plaintiff's
3 Response to the Defendant City of Spokane, Garth Craigen, Daniel Valencia, Mathew
4 Stewart, and Will Mitchell's Motion to Amend Defendant's Answer to Plaintiff's Complaint
5 and Affirmative Defenses. This response is based on the Court Record, the filed response,
6 and the arguments of counsel.
7

8 **I. INTRODUCTION**

9 The Defendant City of Spokane and the shooting police officers request to modify
10 their initial pleadings to add an affirmative defense, the felony bar rule. Defense counsel is
11 required to have a good-faith belief in its legal arguments. It is also required to plead
12 affirmative defenses with particularity. Here, the City's lawyers do not bother to state what
13 felony Mr. Musselman could possibly have been guilty of, and their recent texts messages
14 demonstrate they have no good faith basis to even assert such a claim.
15

16 The defense lawyers for the City file a Motion it knows is unsupportable. We
17 therefore request denial of the Motion and Sanctions. This request is untimely, objectionable
18 and highly inappropriate based on their most recent disclosures in discovery, which show
19 that not only was Joshua Musselman not committing any crime at the time of his death, but
20 officers' text messages to one another show officers were fully aware they did not have
21 probable cause and colluded after the fact to try to create a crime he was committing at the
22 time of his death to justify their negligent and homicidal actions in their reports. The only
23 evidence of a felony crime committed here is the one police have committed in shooting Mr.
24 Musselman in cold blood and without legal justification.
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1 **II. STATEMENT OF FACTS**

2 Prior to his death, Joshua was known to the Spokane Police Department (SPD) who
3 was well aware of his mental health disability. The Spokane police were called to his
4 apartment earlier on the day of his death at around 3:15 p.m. on December 29, 2024. *See*
5 *Exhibit 1, Officer Craigen's BWC Dec. 29, 2024, AXON #X60A6097N*. Spokane police
6 officers responded to a call about someone yelling at an apartment complex. *Id.* At least
7 three officers arrived and walked toward Joshua Musselman's apartment. *Id.* Joshua was
8 sitting right outside his apartment on his third floor balcony, when officers approached on
9 the ground level he greeted them with "Happy New Year." *Id.* Officer Garth Craigen
10 responded to that greeting yelling at Mr. Musselman in an aggressive manner, "what are you
11 yelling about?" Joshua replied that it was none of his business and he has freedom of speech.
12 *Id.* Officer Craigen told Mr. Musselman he heard him yelling at neighbors and Mr.
13 Musselman replied he "self-talks." *Id.* Officer Craigen continued to engage and antagonize
14 Mr. Musselman, lamenting that they (the officers) were constantly having to deal with him.
15 *Id.* Toward the end of the interaction Officer Craigen yelled to Mr. Musselman "You're not
16 intimidating anybody, "you're not scaring anyone." *Id.* As officers left, at least one officer
17 was laughing. *Id.* Neither Officer Craigen, nor any of the other officers utilized training for
18 interacting with people with mental disabilities. *Id.*

19 Approximately an hour and a half later, a 911 call was received from the apartment
20 complex and stated someone in the top floor apartment was shooting in to the dirt hillside.
21 *Exhibit 2, 911 Dispatch Audio*. The hillside is an empty dirt hill that is higher than the
22 apartment complex without structures on it. *Exhibit 3 Craigen BWC2 at 16:42:57, AXON*
23 *#X60A6097N*. When officers arrived, Joshua was inside his home and not firing the BB-

1 gun. *Exhibit 3 Craigen BWC2 at 16:42:57, AXON #X60A6097N*. Officers state in the body
2 worn camera that he has not come outside since they arrived. *Id.* Officers never claim to
3 have seen Joshua Musselman shooting the BB-gun or any weapon at any time that night.

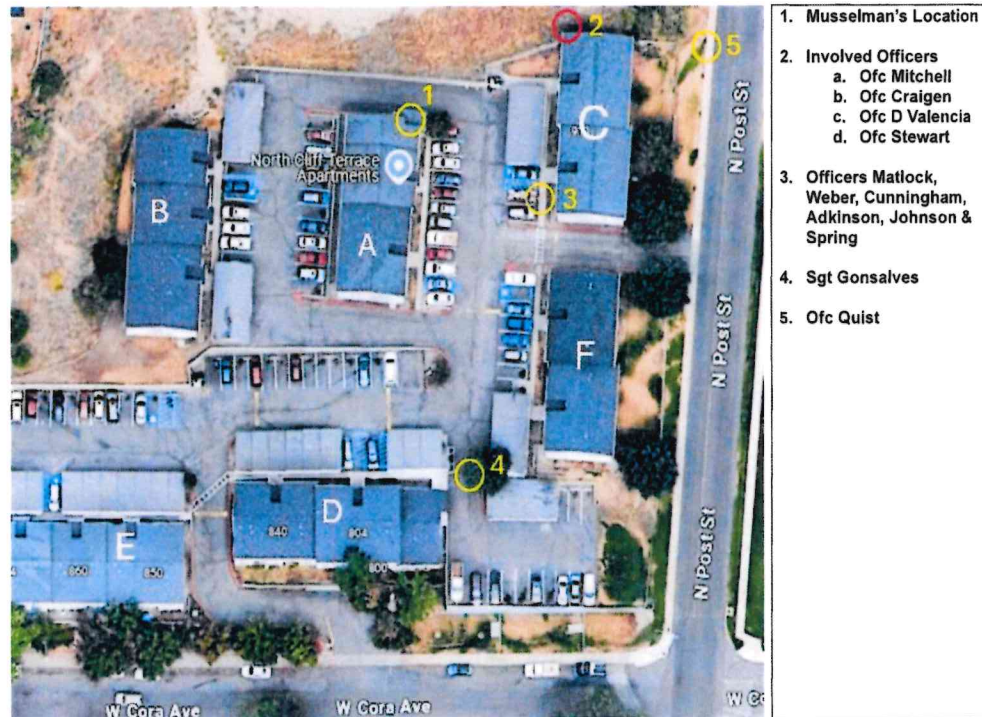
4 *Excerpt from SIIR Team Report Exhibit 4,*

5
6 Responding to the 911 call of someone shooting in to the dirt hillside, Officer
7 Craigen, dispatched to Joshua's apartment less than an hour and a half after he last left, with
8 initially three other officers joining him and eight more around the perimeter. Officer
9 Craigen, and three other officers stationed themselves about 100 feet from Mr. Musselman's
10 apartment, Mr. Musselman was on the third floor, the officers were elevated on the hillside
11 near the corner of the neighboring apartment building that was directly in front of Joshua's
12 building. *Craigen BWC2 at 16:42:57, AXON #X60A6097N*.

13
14 At the same time, this group of "shooting officers" approached in this manner, and
15 climbed the hillside near the opposite corner of apartment buildings, another group of
16 officers were making a tactical plan to safely approach, calling for an armored vehicle (the
17 bear cat) taking cover, and utilizing ballistic shields. *Exhibit 3 Craigen BWC2 at 16:42:57,*
18 *Exhibit 5 Mitchell Body Worn Camera AXON #X60A66269K*. Of the four shooting officers,
19 Officer Mitchell arrived on the hillside first and confirmed that Mr. Musselman was in his
20 apartment. *Exhibit 5 Mitchell BWC Axon #X60A66269K*. Officer Craigen arrived next,
21 adjacent to Officer Mitchell. *Id.* An officer radioed for all responding units to kill their
22 sirens. *Id.* When Officer Craigen arrived, Officer Mitchell advised him to back up so he
23 could not be seen by Joshua. *Exhibit 4 Mitchell Body Worn Camera AXON #X60A66269K*.
24 Officer Craigen arrived and advised that Mr. Musselman had not come out of the apartment
25 since he arrived. *Exhibit 3 Craigen BWC 16:42:57 Axon #X60A6097N*. The shooting
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1 officers were in a low-lit environment where Joshua would not be able to see them; they
2 placed themselves on the hillside near another building. *Id.*

OFFICER LOCATIONS



20 Three minutes before shooting Joshua, Officer Craigen said they (the officers) were
21 positioned too far away to give verbal commands to him. *Exhibit 3 Craigen BWC 16:42:57*
22 *Axon #X60A6097N*. They were at least 100 feet away from Joshua Musselman concealed on
23 the hillside and had cover, concealment and at least one tactical shield. *Id.* Another officer
24 stated that Joshua Musselman could not see them. *Id.* Officer Mitchell notes that he can see
25 Joshua inside his home and that he was speaking to people who were not there. Mitchell
26 *Exhibit 5 Mitchell BWC 16:43:42*. He said Mr. Musselman was five feet inside his door. *Id.*

1 Officer Valencia arrived and positioned himself next to Mitchell and Craigen. Officer
2 Valencia called for the bearcat to arrive and called for SWAT. *Exhibit 5 Mitchell BWC*
3 *16:44:55*. At 16:44:55 an officer advised that Joshua had just stepped outside his apartment
4 and was rolling a joint talking to nobody and was unarmed. *Id.* They also noted the “rifle”
5 was by the front door at 16:43:32. *Id.* In response to this information, an officer asks for a
6 phone number to make contact with Mr. Musselman. *Id.*

8 No officer ever even attempted to give commands to Mr. Musselman, or utilized a
9 loudspeaker or phone to communicate with him, they did not set up a contact team, they did
10 not try to seek time, distance and cover. *See Exhibits 3, 5, 6, 7, and BWC of all Defendants*
11 *and Exhibit 4 SIRR Report excerpts*. Before shooting him, no officer witnessed Joshua
12 saying anything, shoot the BB-gun, or act belligerent towards anyone. *Id. See Exhibits 3, 5,*
13 *6, 7, BWC of Officers Valencia, Mitchell, Craigen and Stewart*. Seconds before he was
14 killed, Joshua Musselman was listening to country music, walking in and out of his
15 apartment, and smoking. *Id.* At 16:44:55 within seconds of killing him an officer noted he
16 was rolling a joint and was unarmed. *Exhibit 5 Mitchell BWC 16:44:55*. At 16:46:22, they
17 also noted the “rifle” was by the front door at 16:43:32. Ten seconds after Joshua’s phone
18 number was requested, at 16:46:10 an officer notes that the gun is to the left side of the door.
19 At 16:46:12 an officer states he doesn’t have a gun and cannot see us. *Exhibit 5 Mitchell*
20 *BWC Axon X60A6269K*. At 16:46:22, ten seconds after officers say he does not have a gun
21 and is smoking and his phone number was requested, officers shoot 15-16 rounds at Joshua
22 and the crowded apartment complex with their AR-15 rifles. Within two seconds the barrage
23 of 15-16 bullets was unleashed, shooting Joshua dead and shooting through the wall of the
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1 neighboring apartment narrowly missing the women inside. Exhibits 3, 5, 6, 7. *BWCs of*
2 *Officers Valencia, Mitchell, Craigen and Stewart.*

3 None of the other officers who were closer to Joshua fired. *Id.* No one gave ANY
4 verbal warning to Joshua that police were even present at the location or seeking to talk to
5 him. *Id.* At 16:51:17 it is again noted the “rifle” (BB-gun) is by the door (it should be noted
6 that the BB-gun is in the same position officers’ stated it was in earlier). *Id.*

7
8 When medical help arrived, Joshua was found on the ground inside his home on his
9 back in the doorway. *Exhibit 8, BWC, Andres Valencia, Axon X6039C69T 16:51:29 first*
10 *officer to ascend stairs after shooting.* The pellet gun was found leaning against the wall
11 outside by the door. *Id.* It was breached open and leaning against the railing in the same
12 position it was earlier (Joshua never had an actual rifle or any other gun, only the pellet BB-
13 gun). Medics attempted CPR and pronounced Joshua Musselman, 29-years-old, dead in his
14 home. *Id.* The SPD shot Joshua in the heart, stomach, buttock and back, they fired 15 rounds
15 striking him 4 times. *Exhibit 9 Autopsy Report.*

16
17 Mr. Musselman was killed one hour and twenty five minutes after the first deficient
18 encounter with SPD, when officers taunted him and knew that he was in need of mental
19 health assistance and failed to act on that knowledge and threatened to come back. *Exhibit 1*
20 *earlier in the day encounter Craigen, BWCA 16:42:57 Axon #X60A6097N.*

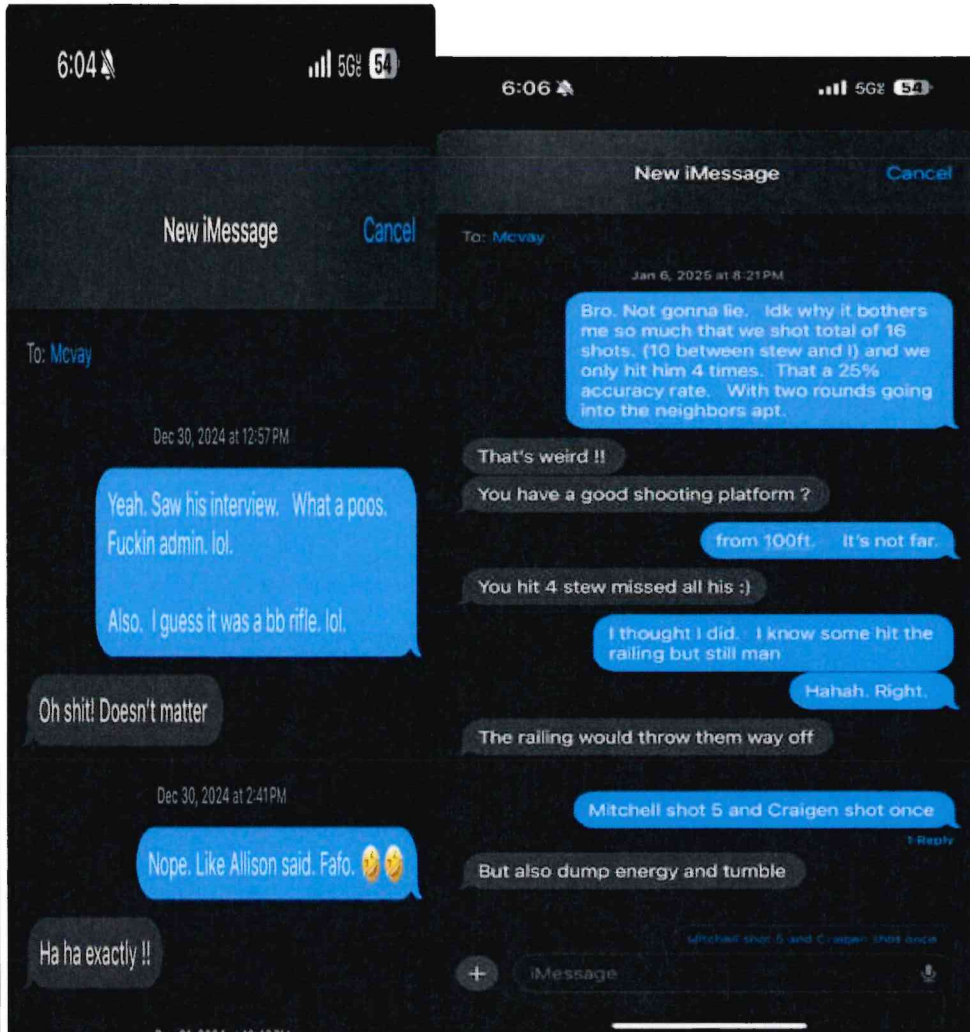
21
22 Mr. Musselman was not threatening anyone or harassing anyone when he was shot
23 and killed on December 29, 2024, in his own apartment. *Exhibits 3, 5, 6, 7.* After shooting
24 Joshua Musselman, the shooting officers convened together in a huddle and shut off their
25 body worn cameras in violation of SPD policy. *Exhibit 3 Craigen BWC Axon #X60A6097N*
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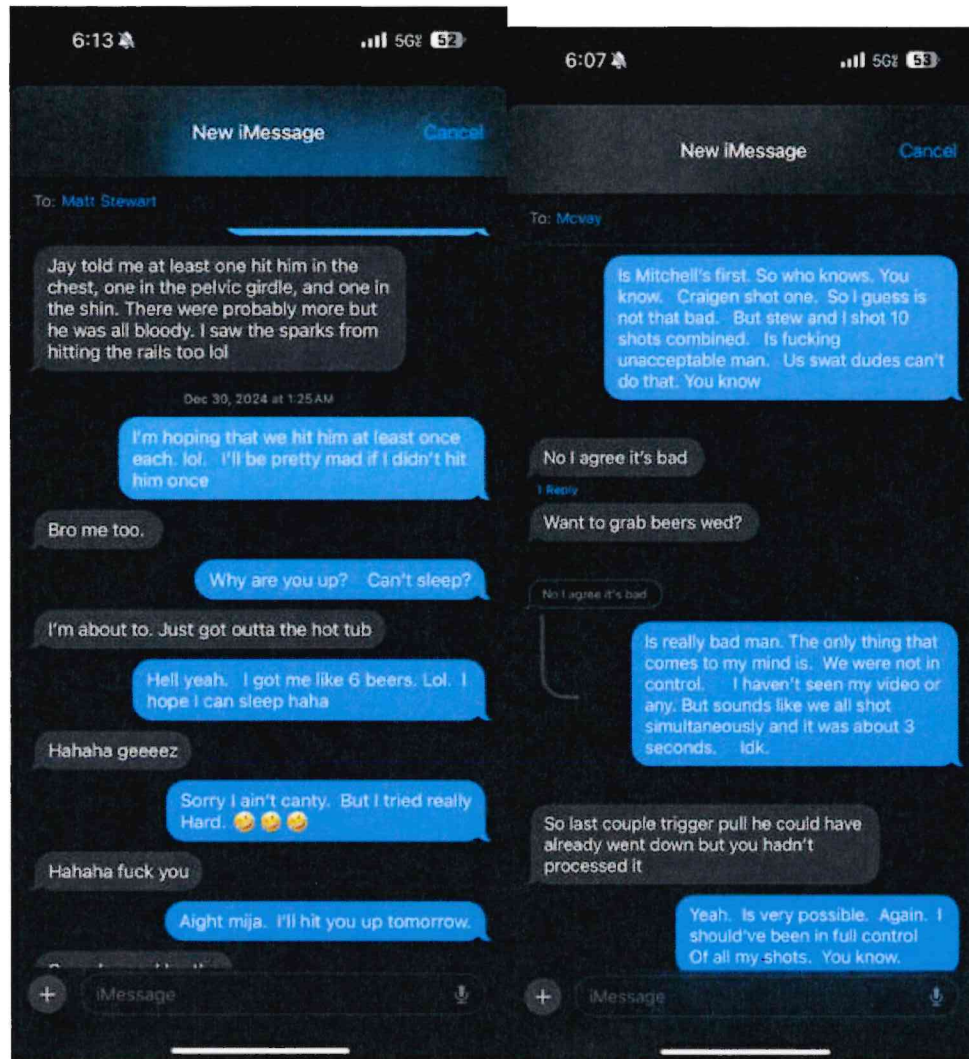
1 Later, two of the four shooting officers, finally provided a statement, unsigned, not
2 dated and not under oath, they did this after being provided the body cameras, some
3 colluded with each other over text messages and over beers in their garage. *See Exhibit 10.*
4 One of the officers that did provide a statement was Officer Garth Craigen. He says he saw
5 Joshua pull the rifle up to the center of his body and into a shooting position, he then saw
6 him drop the rifle and fall backwards. *See Exhibit 4 relevant pages of SIRR Report.* This
7 version of events does not fit with the physical evidence, nor does it match the officer's text
8 messages where they say he turned and ran. *See Exhibit 10.* Officer Willie Mitchell, the
9 second to provide a statement, said the rifle was down by the suspect's side. Officer Craigen
10 states he saw Mr. Musselman with a gun in his hands, although no gun was found except for
11 the pellet gun positioned neatly against the railing of the apartment, and in a breached/open
12 position impossible for firing. Mr. Musselman then had to inexplicably be shot multiple
13 times while turning and running and somehow placing the BB-gun neatly leaning against the
14 railing after being shot so many times in the heart, chest, back and buttocks and losing
15 consciousness quickly. One of the shooting officers, Daniel Valencia, radioed for his brother
16 to go in. When the first officer to approach the body, Officer Daniel Valencia's brother,
17 Andres Valencia, climbs the stairs to the apartment, the BB-gun is far from Mr. Musselman,
18 cocked open and leaning in the same position it is in where officer see it earlier against the
19 railing near the front door. *See Exhibit 8 Andres Valencia BWC X6039C69T.*

23 After an autopsy, the medical examiner determined that the manner of death was
24 multiple gunshot wounds, two gunshots hit him going front to back in the heart (left upper
25 chest) and in the stomach (right upper abdomen) and two gunshots hit him going back to
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front in the left lower back and left buttock meaning those shots would have hit him when he was facing away from officers. *Exhibit 9 Autopsy Report*.

After, police kill Joshua Musselman an autistic disabled man, and even after knowing he had a BB-gun and was a disabled man with mental health issues, they say FAFO (Fuck Around and Find Out) laugh about it together on text and talk about how they wish they were better shots and wish they could have had more bullets hit him. The following texts are from the officer's phones:





Plaintiffs propounded Interrogatories to the City of Spokane on February 3, 2026; on June 5, 2026 we received these first text messages. After clearly seeing that the text messages above were only a portion of what was being discussed, and that defense counsel had knowingly left out the entire conversation, a request was made for the additional texts, counsel for plaintiffs asked for all texts made by or between the shooting officers regarding this incident, and another batch of texts messages in discovery came from the City's attorney on September 17, 2027, this is seven months after our first request on February 3, 2026.

Unsurprisingly, the Defense has still inappropriately left out portions of the messages and

1 redacted them without asking for permission from the court to do so. Nevertheless, the
2 second set of discovery was more shocking than the first. *See Exhibit 10*. Police again
3 mocked the disabled man they had killed, laughed at their killing of him, called him a
4 “douche” said “FAFO” and colluded together to determine what crime they could say
5 Joshua Musselman was committing, after admitting they had no probable cause to even
6 engage. *Id.* Perhaps the most damning is they stated it was hard to hit a moving target when
7 he was running away, this also fits with the autopsy report of two of the shots hitting Joshua
8 Musselman going from back to front. The autopsy report states there are four gunshot
9 wounds that hit him, two shots going front to back and two shots going back to front. *Exhibit*
10 *9*. Fractures of the ribs, spine, pelvis, damage to the heart, lungs, liver, spleen, pancreas, left
11 kidney, stomach, colon, soft tissue, and a large amount of bleeding into the chest and
12 abdominal cavities. *Id.* The cause of death is multiple gunshot wounds and the manner of
13 death is homicide. *Id.* There were no gunshot wounds to the hands, as one would expect had
14 he been in a firing stance as at least one officer claimed. *Id.* Defense counsel for the City of
15 Spokane and the Officers, Keating Bucklin and McCormack clearly withheld information, as
16 it was clear from the text messages that the information we requested was incomplete.
17 Further even with this second set of responsive text messages, conversations are still
18 missing.
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22 **III. LAW AND ARGUMENT**

23 **a. CR 15 and Amendment of an Answer**

24 CR 15(a) states: “A party may amend the party’s pleading once as a matter of course
25 at any time before a responsive pleading is served, or, if the pleading is one to which no
26 responsive pleading is permitted and the action has not been placed upon the trial calendar,
27

1 the party may so amend it at any time within 20 days after it is served. Otherwise, a party
2 may amend the party's pleading only by leave of court or by written consent of the adverse
3 party; and leave shall be freely given when justice so requires." In addition to considering
4 any prejudice amendment would impose on the nonmoving party, the court may also
5 consider whether amendment is futile. *Salvo v. Wash. State Crim. Just. Training Comm'n*,
6 36 Wn.App.2d 597, 589 P.3d 310 (2026), citing *Larson v. Snohomish County*, 20 Wn. App.
7 2d 243, 286, 499 P.3d 957 (2021).

9 Appellate Courts have affirmed denials of Motions to Amend Pleadings pursuant to
10 CR 15 multiple times, including based upon futility. See *Shogren v. Wash. State Bar Ass'n*,
11 37 Wn.App.2d 323, 591 P.3d 1285 (2026)(affirming denial of motion to amend because the
12 issues would have been futile); *Trust Fund Servs. v. Glasscar, Inc.*, 19 Wn.App. 736, 577
13 P.2d 980 (1970) (affirming trial Court discretion to deny amendment of an answer); and
14 *Gull Indus., Inc. v. Granite State Ins. Co.*, 18 Wn.App.2d 842, 493 P.3d 1183 (2021) (see
15 footnote 39, affirming the trial Court denial of Motion to Amend pleadings), review denied
16 199 Wn.2d 1007, 506 P.3d 646 (2022).

18 It is not an abuse of discretion for a trial Court to deny a motion for leave to amend if
19 the proposed amendment is futile. See *Orwick v. Fox*, 65 Wn. App. 71, 89, 828 P.2d 12
20 (citing *Doyle v. Planned Parenthood of Seattle-King County, Inc.*, 31 Wn. App. 126, 132,
21 639 P.2d 240 (1982)), review denied, 120 Wn.2d 1014 (1992). See also *Rodriguez v.*
22 *Loudeye Corp.*, 144 Wn.App 709, 189 P.3d 168 (2008).

24 The Court in this case should deny the Defendant's Motion to Amend its Answer to
25 add the affirmative defense of the Felony Bar Rule because such a defense is futile, and
26 under the facts of this case absolutely impossible to prove.

1 **b. Affirmative Defenses/Felony Bar Rule, RCW 4.24.420**

2 RCW 4.24.420, the Felony Bar Rule, was amended in 2021, and the statute was
3 changed to include the following requirement for raising this affirmative defense in
4 circumstances involving use of force by a law enforcement officer: “In an action arising out
5 of law enforcement activities resulting in personal injury or death, it is a complete defense to
6 the action that the finder of fact has determined beyond a reasonable doubt that the person
7 injured or killed was engaged in the commission of a felony at the time of the occurrence
8 causing the injury or death, the commission of which was a proximate cause of the injury or
9 death.” RCW 4.24.420(2).
10

11 The Defendants must demonstrate that Joshua Musselman was engaged in the
12 commission of a felony, beyond a reasonable doubt. The evidence in this case has already
13 established that Defendants Craigen, Valencia, Mitchell, and Stewart did not have probable
14 cause regarding any crime when they shot and killed Joshua, in fact they lamented they only
15 shot him four times, twice in the back, because he was facing away from them and running
16 away. *See Exhibit 10*.
17

18 Proof of any crime being committed simply does not exist. Seconds before Joshua
19 Musselman was killed Officers stated he was standing on his balcony rolling a joint. *Exhibit*
20 *3*. Their later descriptions of him pointing a BB-gun make no sense as they state he did not
21 know they were there and could not see them. The Officer’s text messages to one another
22 make this all the more damning. *See Exhibit 10*. They admit they did not have pc, because
23 he was never doing anything illegal when they arrived on scene. *Id*. They admit they shot
24 him in the back while he was running away. *Id*. They admit they have no crime available to
25 them to justify their killing Joshua Musselman! *Id*. These facts are a shock to the conscience.
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1 The Due Process clause of the United States Constitution requires proof beyond a
2 reasonable doubt be established to determine a person has committed a crime. *In re Winship*,
3 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Washington State has enshrined that
4 requirement, along with the presumption of innocence, in the form of RCW 9A.04.100,
5 which states: "Every person charged with the commission of a crime is presumed innocent
6 unless proved guilty. No person may be convicted of a crime unless each element of such
7 crime is proved by competent evidence beyond a reasonable doubt." RCW 9A.04.100(1).
8 Any jury tasked with determining the existence of the affirmative defense of the felony bar
9 rule would need to be instructed on what reasonable doubt means. Whether that involves use
10 of WPIC 4.01 or a form of the *Castle* instruction, no jury that hears the evidence in this case
11 would ever be able to determine that any felony was being committed by Joshua
12 Musselman. *See State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007).

13
14
15 As stated above, Defendants Craigen, Valencia, Stewart and Mitchell could not
16 identify why they were even at Mr. Musselman's apartment complex after arriving and
17 witnessing him doing nothing illegal, and acknowledged that none of them had developed
18 probable cause for their presence, let alone a legal justification for their use of deadly force.
19 *See Exhibits 10&11*. Officers admitted in the text messages they had no proximate cause and
20 colluded about what crime they could say they were there for, but the facts are Joshua
21 Musselman was on his own balcony, unarmed and smoking when police opened fire. *See*
22 *Exhibits 3, 5, 6, 7, 10 and 11*.

23
24 On December 30, 2024 at 1:14 p.m., Officer Daniel Valencia texts Officer Matt
25 Stewart, "Soooo what's the crime we were investigating yesterday. Unlawful discharge?"
26 "Haha" Matt Stewart replies, "Hahahahahahahah. Being a douche lol." Daniel Valencia
27

1 replies, "Right. But for reals. For the report, What's the crime at that point. Unlawful
2 discharge or are we doing a welfare check? Lol. Cuz no one developed pc. Huh? Lol."
3 Stewart answers "I would say unlawful discharge at this point" Valencia replies, "lol." Matt
4 Stewart replies "Oh well lol." *See Exhibit 10*. Even assuming they could prove the crime
5 they came up with unlawful discharge of a BB-gun is a gross misdemeanor and not a felony.
6 RCW 9.41.230.
7

8 On January 6, 2026, Daniel Valencia texts Mathew Stewart and states that "I wanted
9 to tell you this but haven't found the time. Just want you to hear it from me. I'm really
10 pissed off at you and i. I can't believe that the two of us shot 10 rounds combined and fucker
11 only got shot 4 times. Is fucking unacceptable bro. Idk about you but its been killing me ever
12 since. We're supposed to be the best if the department and this is what we did. Fuck man."
13 Stewart replies: "I know man. I was thinking that too. I mean he turned and started running
14 so it's a moving target at 40 yards. Not the best." This evidence is clear proof that Mr.
15 Musselman was not committing any crime at the time of his death and the Court should not
16 allow the Defense to assert claims that would mislead and confuse a jury especially when
17 there is no good faith justification for such a claim in law or fact.
18

19 Assuming *arguendo* that the Court determines this defense is appropriate, Officers
20 also made repeated comments regarding Joshua's mental health competency. His mental
21 health diagnosis, and his repeated hospitalizations and competency evaluations, were well
22 known to officers. Thus, there is no evidence to support any determination that Joshua had
23 the capacity to form any intent to commit any crime. The Defendant bears the burden of
24 establishing the felony bar rule as an affirmative defense. *Camicia v. Howard S. Wright*
25 *Constr. Co.*, 179 Wn.2d 684, 693, 317 P.3d 987 (2014) (the party raising affirmative defense
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1 bears the burden of proof), *see also Anderson v. Grant County*, 6 Wn.3d 69, 585 P.3d 87
2 (2026). It must be pleaded with particularity and here Defendants have provided no basis or
3 legal claim for what felony Mr. Musselman was committing and how that was a proximate
4 cause of his death.

5
6 Unlike in *Davis v. King County* and *Watness v. City of Seattle*, where the Court
7 rejected dismissal of wrongful death lawsuits regarding unlawful use of force by law
8 enforcement based on the felony bar rule because genuine issues of material fact existed
9 regarding mental capacity and intent, there is no genuine issue of material fact regarding
10 Joshua Musselman lack of capacity and inability to form any criminal intent, even assuming
11 arguendo, that there was even the chance of a possible crime that these officers could try to
12 assert that was 1) a felony; and 2) a proximate cause of his death. *Davis*, 16 Wn.App.2d 64,
13 479 P.3d 1181 (2021) and *Watness*, 16 Wn.App.2d 297, 481 P.3d 570 (2021), *review denied*
14 197 Wn.2d 1023 (2021). Importantly, RCW 4.24.420 has been amended to require proof of
15 any felony beyond a reasonable doubt. *Watness and Davis* were decided before that
16 amendment, and as described above, there is no room for alternative conclusions regarding
17 Joshua Musselman's mental capacity: he was unable to form any intent and his actions did
18 not involve any felony crime, as acknowledged by the officers who shot and killed him.
19 Amending the answer to include the affirmative defense of the felony bar rule is futile,
20 untimely, unsupported and should be denied. CR 15, *Larson*, 20 Wn. App. 2d at 286.

21 **IV. CONCLUSION**

22
23 The Defendant City of Spokane has failed to demonstrate that amending their answer
24 and adding the felony bar rule as an affirmative defense would be anything other than futile.
25
26 The evidence has established that officers had no legal justification for the use of deadly
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1 force. The Defendants cannot meet their burden to establish the affirmative defense beyond
2 a reasonable doubt. The Defendants' Motion to Amend their Answer should be denied and
3 sanctions should be granted to the Plaintiffs for having to respond to this frivolous Motion.
4

5 DATED October 13, 2026.

6
7 MEYER THORP ATTORNEYS AT LAW, PLLC

8 
9 Rondi Thorp, WSBA 32872

10 Attorney for the Plaintiffs
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