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6 THE STATE OF WASHINGTON
7 KING COUNTY DEPARTMENT OF EXECUTIVE SERVICES

8 *IN RE: THE INQUEST INTO THE DEATH OF* | No. 517IQ8013

9 DAMARIUS BUTTS

RESPONSE TO CRIMINAL MEANS
INSTRUCTION

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12 **I. INTRODUCTION**

13 The Pro Tem Attorney, Matt Anderson, circulated draft jury instructions for the jury's
14 criminal means finding. The first instruction reads as follows:

15 It is your duty to determine who caused the death of Damarius Butts and whether
16 his death was caused by criminal means. A death is caused by criminal means if
17 the death was caused by the use of deadly force and the use of such force was not
justifiable as defined in these instructions.

18 The second instruction states:

19 1. The use of deadly force that results in a death is justifiable when necessarily
20 used by a peace officer to arrest or apprehend a person who the officer reasonably
21 believes has committed a felony and the officer acts without malice and with a good
22 faith belief that probable cause exists to believe that the suspect, if not apprehended,
posed a threat of serious physical harm to the officer or a threat of serious physical
harm to others.

23 2. Among the circumstances that may be considered by a peace officer as a
24 "threat of serious physical harm" are the following: (a) The suspect threatened a
25 peace officer with a weapon or displayed a weapon in a manner that could
reasonably be construed as threatening; or (b) There was probable cause to believe
that the suspect committed any crime involving the infliction or threatened
infliction of serious physical harm.

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2 3. Necessary means that, under the circumstances as they reasonably appeared
3 to the officer at the time, (1) no reasonably effective alternative to the use of force
4 appeared to exist and (2) the amount of force used was reasonable to effect the
5 lawful purpose intended.

6 4. Malice means an evil intent, wish, or design to vex, annoy, or injure another
7 person. Malice may be, but is not required to be, inferred from an act done in willful
8 disregard of the rights of another.

9 The second instruction is purportedly derived from the version of RCW 9A.16.040 that was in
10 effect on the day that Damarius Butts was killed. The Butts family objects to the inclusion of a
11 malice standard into the criminal means finding. A criminal means finding is not a finding of
12 criminal liability. Instead, as the Supreme Court recently held, it is a probable cause finding—
13 which as a substantially lower threshold than a finding of criminal liability. As such, it is improper
14 to require ‘malice’ under RCW 9A.16.040 as that statute only requires a finding of malice for
15 criminal liability.

16 **II. ARGUMENT**

17 RCW 9A.16.040(3) provides that “[a] public officer or peace officer shall not be held
18 criminally liable for using deadly force without malice and with a good faith belief that such act is
19 justifiable pursuant to this section.” The malice provision is only applicable to a finding of criminal
20 liability. As a result, requiring a finding of “malice” is inappropriate for an inquest. This is
21 supported by the Supreme Court’s holding in *Butts*. 198 Wn.2d 27, 43 n.5, 491 P.3d 132 (2021).
22 This is evidence by the Supreme Court’s response to Law Enforcement Parties argument that “the
23 inquest jury cannot be allowed to determine issues of criminal liability because an inquest is
24 not criminal trial[.]” *Id.* In response to this argument, the Supreme Court described an inquest
25 jury’s criminal means verdict is “a type of probable cause determination.” *Id.* This is because, as
repeatedly discussed in *Butts*, an inquest jury’s finding is not a finding of criminal liability and,

1 indeed, cannot be one because it is not made pursuant to a beyond a reasonable doubt standard and
2 because other constitutional protections for criminal proceedings are not present.

3 Due to this the imposition of the SPD’s proposed “safe haven of RCW 9A.16.040(3) which
4 [SPD argues] protects officers who lack a culpable mental state from criminal liability” is
5 inappropriate because an inquest jury’s finding is by definition—and by affirmance of the Supreme
6 Court—not a finding of criminal liability. If there was a criminal prosecution reviving a long
7 defunct statute to protect the officers might make sense. However, importing a “malice” standard
8 into a probable cause is inappropriate and turns a probable cause finding on its head.
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10 **III. BUTTS FAMILY’S PROPOSAL**

11 The Butts family notes that the inquest jury will need to be provided either instructions or
12 information regarding the elements of potential crimes that were committed along with an
13 instruction regarding criminal means. The Butts Family proposing including the following
14 Washington Pattern Jury Instructions:

15 “Probable cause” means facts that would cause a reasonably cautious officer to believe that the
16 person had committed that crime. WPIC 120 (in relevant part)

17 An assault is an intentional touching or striking or shooting of another person, with unlawful force,
18 that is harmful or offensive. A touching or striking or shooting is offensive if the touching or
striking or shooting would offend an ordinary person who is not unduly sensitive. WPIC 35.50.

19 A person commits the crime of murder in the first degree when, with a premeditated intent to cause
20 the death of another person, he or she causes the death of such person or of a third person unless
the killing is excusable or justifiable. WPIC 26.01

21 A person commits the crime of murder in the second degree when with intent to cause the death
22 of another person but without premeditation, he or she causes the death of such person or of a third
person unless the killing is excusable or justifiable. WPIC 27.01

23 A person commits the crime of manslaughter in the first degree when he or she recklessly causes
24 the death of another person unless the killing is excusable or justifiable. WPIC 28.01
25

1 A person commits the crime of manslaughter in the second degree when, with criminal negligence,
2 he or she causes the death of another person unless the killing is excusable or justifiable. WPIC
28.05

3 A person acts with intent or intentionally when acting with the objective or purpose to accomplish
4 a result that constitutes a crime. WPIC 10.01

5 Premeditated means thought over beforehand. When a person, after any deliberation, forms an
6 intent to take human life, the killing may follow immediately after the formation of the settled
7 purpose and it will still be premeditated. Premeditation must involve more than a moment in point
of time. The law requires some time, however long or short, in which a design to kill is deliberately
formed. WPIC 26.01.01

8 A person is criminally negligent or acts with criminal negligence when he or she fails to be aware
9 of a substantial risk that a wrongful act may occur and this failure constitutes a gross deviation
10 from the standard of care that a reasonable person would exercise in the same situation. WPIC
10.04

11 **IV. CONCLUSION**

12 For the foregoing reasons the Inquest Administrator should create a new criminal mean
13 jury instruction that removes any and all references to malice and also include the proposed
14 Washington Pattern Jury Instructions submitted by the Butts Family.

15 DATED this 2nd day of November 2021.

16 Respectfully submitted:

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on November 2, 2021, I served by email one copy of the foregoing
3 pleading on the following:

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