

No.

It is your duty to determine, based on the preponderance of the evidence, who caused and the circumstances of the death of Damarius Butts and whether his death was caused by criminal means. A death is caused by criminal means if a reasonably cautious person would believe, based on the preponderance of the evidence, that the person who caused the death committed a crime in the use of deadly force.

No.

1. The use of deadly force that results in a death is justifiable when necessarily used by a peace officer to arrest or apprehend a person who the officer reasonably believes has committed a felony and the officer acts without malice and with a good 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.

2. Among the circumstances that may be considered by a peace officer as a “threat of serious physical harm” are the following: (a) The suspect threatened a 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.

3. Necessary means that, under the circumstances as they reasonably appeared to the officer at the time, (1) no reasonably effective alternative to the use of force appeared

to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

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

**COMMENT:**

RCW 9A.16.040(3) provides that “[a] public officer or peace officer shall not be held criminally liable for using deadly force without malice and with a good faith belief that such act is justifiable pursuant to this section.” The malice provision is only applicable to a finding of criminal liability. Due to this requiring a finding of “malice” is inappropriate for an inquest. This is supported by the Supreme Court’s holding in *Butts*. This is evidence by the Supreme Court’s response to Law Enforcement Parties argument that “the inquest jury cannot be allowed to determine issues of criminal liability because an inquest is not criminal trial[.]” *Butts* at 23. In response to this argument, the Supreme Court described an inquest jury’s criminal means verdict is “a type of probable cause determination.” *Butts* at 24 n.5. This is because, as repeatedly discussed in *Butts*, an inquest jury’s finding is not a finding of criminal liability and, indeed, cannot be one because it is not made pursuant to a beyond a reasonable doubt standard and because other constitutional protections for criminal proceedings are not present.

Due to this the imposition of the SPD’s proposed “safe haven of RCW 9A.16.040(3) which [SPD argues] protects officers who lack a culpable mental state from criminal liability” is

inappropriate because an inquest jury's finding is by definition—and by affirmance of the Supreme Court—not a finding of criminal liability. If there was a criminal prosecution reviving a long dead statute to protect the officers might make sense. However, importing a “malice” standard into a probable cause is inappropriate and turns a probable cause finding on its head. Further, the Butts family notes that the inquest jury will need to be provided either instructions or information regarding the elements of potential crimes that were committed along with an instruction regarding criminal means.