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6 KING COUNTY DEPARTMENT OF EXECUTIVE SERVICES
7 INQUEST PROGRAM

8 INQUEST INTO THE DEATH OF:

Inquest No.: 17IQ427069

9 ALBERT WAYNE FREDERICKS, JR.,

**INVOLVED OFFICERS’
BRIEFING RE JURY
INSTRUCTIONS**

10 Deceased.
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13 Seattle Police Department Officers Timothy Oliverson, Jacob Rogers, Garret Hay,
14 Nathan Jerome and Andrew Swartz (the “Officers”), by and through their counsel, Ted Buck,
15 Karen L. Cobb and Delaney DiGiovanni of Frey Buck, P.S., submit this briefing regarding the
16 jury instructions proposed by the Administrator and the Family in this matter.

17 **A. The Criminal Mean Instructions Proposed by the IA and Family Improperly**
18 **Broaden the Scope of the Inquest.**

19 The purpose of an inquest is narrow and governed by King County Executive Order:

20 **3.2.** The administrator, after consultation with the participating parties, shall determine the
21 inquest scope. Consistent with the purpose as set forth in the amended Charter, Executive
22 Order, and Appendix 1 and 2, the inquest scope shall include an inquiry into and the panel
23 shall make findings regarding the cause, manner, and circumstances of the death,
including applicable law enforcement agency training and policy. The panel shall make
findings regarding whether the law enforcement officer complied with applicable law
enforcement agency training and policy as they relate to the death.

1 Paragraph 3.2 to Appendix 2 of PHL-7-1-5 EO (Procedures for Conducting Inquests 2021). The
2 stated intent of an inquest is to allow the jury panel to determine the facts and circumstances
3 surrounding the death of Mr. Fredericks by answering interrogatories. The sole purpose of the
4 jury instructions is to assist the jury panel in answering the factual questions contained in the
5 interrogatories.

6 Similarly, the Coroner’s Act compels the coroner to facilitate the jury’s duty to
7 issue a verdict setting forth the essential details of the circumstances attending the
8 death being investigated. RCW 36.24.070. The verdict must set forth the identity
9 of the decedent, when and where they were killed, and the means by which they
10 were killed. *Id.* If those means were criminal, the Coroner’s Act requires the
inquest jury name “who is guilty thereof, if known.” *Id.* But the jury has no
specialized knowledge about what actions are or are not criminal. The coroner
facilitates the jury’s verdict by submitting questions the jury must answer and
providing written instructions for how to answer each question.

11 *Family of Butts v. Constantine*, 198 Wn.2d 27, 46, 491 P.3d 132, 144 (2021) (emphasis added).

12 The Butts’ Court made clear that “A coroner’s inquest is not a culpability-finding
13 proceeding.” *Id.*, citing *State v. Ogle*, 78 Wn.2d 86, 88, 469 P.2d 918 (1970). Rather, an inquest
14 is one of four “established, recognized and legally permissible methods for determining the
15 existence of probable cause.” *Butts, supra*, citing *State v. Jefferson*, 79 Wn.2d 345, 347, 485
16 P.2d 77 (1971). Consistent with this purpose, the inquest jury’s verdict regarding criminal means
17 is a determination whether probable cause exists to arrest and charge a person who allegedly
18 committed a crime. *See* RCW 36.24.100. The jury instructions must be narrowly tailored to
19 ensure that the scope of the inquest is not improperly expanded to a culpability finding
20 proceeding, but to fulfill its specific intent.

21 **B. The Criminal Means Instructions Proposed by the IA and Family are Improper**
22 **in the Inquest Context.**

23 The instructions being proposed here are absolutely seeking to establish criminal
“culpability,” rather than determine criminal “means,” despite that the Medical Examiner has not

1 found the death to be a homicide, rather either an “accident” or potentially “undetermined.” The
2 very title under which the proposed instructions fall is “*WPIC Chapter 10. General*
3 *Requirements of Culpability.*” There can be no probable cause to arrest any individual for a death
4 that is not even deemed to have occurred at the hands of another, i.e. “homicide.” RCW
5 9A.32.010 (homicide defined).¹ At most, the officers’ actions *may be* “contributory.”

6 First, there is nothing to suggest that the officers caused any compression of Mr.
7 Frederick’s chest or airways that could have contributed to death. Second, the
8 videos demonstrate that Mr. Fredericks was unresponsive while being restrained
9 on the ground and was lifted onto the medics’ gurney rather than having walked
10 to the gurney under his own power (as is described in our investigator’s report).
11 The first of these points confirms that I would not classify this death as a
12 homicide. The second point, though, does suggest that the circumstances
13 surrounding Mr. Fredericks’ death meet the criteria for what is traditionally
14 classified as an undetermined manner of death at this office. It is my opinion that
15 methamphetamine and ethanol intoxication is the primary cause of death, but that
16 his agitated interaction with police, his physical exertion in resisting restraint, and
17 his prone position while restrained may have contributed to his death.

18 See Email from Dr. Brian Mazrim, M.E., forwarded by Claire Thornton to counsel on August 15,
19 2022. If the ME cannot determine that a homicide occurred, a lay jury certainly cannot. The ME
20 makes that determination, while the jury decides criminal means. They are not the same. If this
21 were a civil or criminal matter the instructions may be relevant, but where culpability plays
22 absolutely no role, the culpability instructions are improper.

23 The main criminal means instructions proposed by the Administrator read as follows:

No. _____

A death **caused by an officer’s use of force** is committed by criminal means if
the officer’s use of force is criminally negligent or reckless and is a proximate
cause of the death. If you find by a preponderance of the evidence that the death
was caused by criminal means, you must also specifically identify each officer
who so acted.

IA’s Proposed Jury Instructions, p. 23.

¹ Homicide is the killing of a human being by the act, procurement, or omission of another, death
occurring at any time, and is either (1) murder, (2) homicide by abuse, (3) manslaughter, (4) excusable
homicide, or (5) justifiable homicide.

1 No. _____

2 A death **caused by an officer** is also committed by criminal means if, following a
3 use of force, 1) the officer fails to closely monitor the person or 2) the officer
4 restrains a person in custody in a manner that compromises the person's ability to
5 breathe, and 3) the officer's act or failure to act is criminally negligent or reckless
and is a proximate cause of the death. If you find by a preponderance of the
evidence that the death was caused by criminal means, you must also specifically
identify each officer who so acted or failed to act.

6 *IA's Proposed Jury Instructions, p. 24.* There is no pattern instruction or citation to any relevant
7 statute upon which the above instructions are based. Instead, the proposed instructions are
8 cobbled together from various sources and incorporate language direct from SPD policy as if to
9 suggest that violation of policy itself could form the basis for *criminal* liability. This is not to say
10 that policy and training are not relevant; however, the proper citation to policy and training must
11 be not be as an "element" of an alleged offense, but as required to assess the *factors* necessary to
12 make the final determination regarding the nature of the force and whether it is lawful under
13 statute (i.e. necessity, good faith, etc.).

14 The IA's proposed instructions, referencing various inapplicable pattern instructions, read
15 as follows:

16 No. _____

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

19 WPIC 10.04

20 *IA's Proposed Jury Instructions, p. 25.*

21 No. _____

22 A person is reckless or acts recklessly when he or she knows of and disregards a
substantial risk that a death may occur, and this disregard is a gross deviation
from conduct that a reasonable person would exercise in the same situation.

23 WPIC 10.03

IA's Proposed Jury Instructions, p. 26.

1 The referenced pattern jury instructions actually read as follows:

2 A person is reckless or acts recklessly when he or she knows of and disregards a
3 substantial risk that [**a wrongful act**] [(fill in more particular description of act, if
4 applicable)] may occur and this disregard is a gross deviation from conduct that a
5 reasonable person would exercise in the same situation.

6 *See* WPIC 10.03 Recklessness—Definition.

7 A person is criminally negligent or acts with criminal negligence when he or she
8 fails to be aware of a substantial risk that [**a wrongful act**] [(fill in more particular
9 description of act, if applicable)] may occur and this failure constitutes a gross
10 deviation from the standard of care that a reasonable person would exercise in the
11 same situation.

12 *See* WPIC 10.04 Criminal Negligence—Definition.

13 The *assumptions* encased in the proposed instructions have no place in an inquest where
14 fact finding is the intended purpose of the entire proceeding. These instructions do not inquire as
15 to whether the officers’ use of force was by criminal means,

- 16 • they *assume* Mr. Fredericks’ death was “caused by an officer” as an integral and
17 indispensable part of the instruction.

18 [At most their actions were *potentially* contributory according to the ME.]

- 19 • they *assume* that the minimal force necessary to overcome Mr. Frederick’s actual
20 resistance and get him handcuffed was a “wrongful act.”

21 [It is not if it is statutorily protected behavior under RCW 9A.16.020, which
22 identifies *conduct* which is “not unlawful.”]²

- 23 • they *assume* that the minimal force necessary to overcome Mr. Frederick’s actual
resistance to handcuffing “created a substantial risk of death.”

[The officers challenge any party to make a credible argument that routine
handcuffing while a person struggles against it creates a “substantial risk of
death.”]

Rather than providing assumptions that must necessarily be taken as true by the jurors as
part of the instructions, the proper procedure and analysis is whether the officers’ conduct is

² See further discussion in Section B.

1 statutorily protected behavior under the dictates of RCW 9A.16.020, using the factors contained
2 therein to advise the jury regarding criminal means. As discussed further below, contrary to the
3 position taken by the Family in the last hearing, the instructions proposed by the Officers do
4 incorporate analysis of SPD policy and training in their weighing of the statutory factors:
5 necessity, good faith and, as to RCW 71.05, lack of gross negligence. The instructions as
6 proposed would be highly prejudicial to the Officers by feeding the jury improper and incorrect
7 assumptions as facts, rather than having the jury determine the facts, then assess the proper
8 statutory factors based upon their findings.

9 **C. RCW 9A.16.020 Provides the Proper Basis for the Determination of Criminal**
10 **Means.**

11 There has been discussion and argument that the circumstance facing us in this matter—
12 where the minimal force used was clearly and admittedly not deadly force—is a matter of first
13 impression. While rare in the inquest setting, the proper framework nonetheless exists. Well
14 established Washington law applies to this situation in the same manner as it applies to the use of
15 deadly force. That established law is contained in RCW Chapter 9A.16, entitled “Defenses.”
16 The defenses applicable here are affirmative defenses, i.e. it is the prosecutor’s burden to
17 *disprove* that the force was “not unlawful,” the only proper *assumption* in this matter.

18 By way of example, in the Butts and Lyles inquests, the first two under the new inquest
19 rules, the jurors were asked to determine the facts and circumstances of the death and whether
20 the officers’ actions were justified pursuant to RCW 9A.16.040 et seq., based upon the factors
21 laid out therein, and whether they were in compliance with their SPD policies and training. There
22 is parallel statutory authority in RCW 9A.16.020 et seq. dealing with force other than deadly
23 force. There is no need to recreate the wheel. Further, there are pattern jury instructions that are

1 specifically intended for use in the exact circumstances at issue here and there is no reason to
2 bypass them.

3 The chart below parallels the instructions given in the Lyles matter, with those the
4 Officers propose be given in the Fredericks matter:

LYLES FINAL INSTRUCTIONS	FREDERICKS INSTRUCTION PROPOSED BY THE INVOLVED OFFICERS
<p data-bbox="237 621 911 831">No. 11 A death caused by an officer’s use of deadly force is justifiable when necessarily used by the officer to overcome actual resistance to an order from the officer. RCW 9A.16.040(1)(b)</p>	<p data-bbox="966 621 1377 1703">No. Use of force—When lawful. The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases: (1) Whenever necessarily used by a public officer in the performance of a legal duty, or a person assisting the officer and acting under the officer's direction; ... (6) Whenever used by any person to prevent a mentally ill, mentally incompetent, or mentally disabled person from committing an act dangerous to any person, or in enforcing necessary restraint for the protection or restoration to health of the person, during such period only as is necessary to obtain legal authority for the restraint or custody of the person. RCW 9A.16.020 (1) & (6); WPIC 17.01 & WPIC 17.03</p>
<p data-bbox="237 1734 911 1871">No. 12 A death caused by an officer’s use of deadly force is justifiable when necessarily used by the officer to arrest or apprehend a person who the officer</p>	<p data-bbox="966 1734 1377 1881">No. “Necessary” or “necessarily” means that, under the circumstances as they appeared</p>

<p>1 reasonably believes has committed, or attempted to commit, a felony.</p> <p>2 In considering whether to use deadly force to arrest or apprehend any person for the commission of any 3 crime, an officer must have probable cause to believe 4 that the person, if not apprehended, poses a threat of serious physical harm to the officer or a threat of serious physical harm to others.</p> <p>5 Among the circumstances that may be considered by an officer as a “threat of serious physical harm” are 6 the following: (a) The person threatened the officer with a weapon or displayed a weapon in a manner that 7 could reasonably be construed as threatening; or (b) 8 There was probable cause to believe that the person committed any crime involving the infliction or 9 threatened infliction of serious physical harm.</p>	<p>to the actor 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.</p> <p>RCW 9A.16.010 (1)</p>
<p>10 No. 13 “Deadly force” means the intentional application of force through the use of a firearm or any other means likely to cause death or serious physical injury. 11 RCW 9A.16.010(2)</p>	<p>No.</p> <p>Pursuant to RCW 71.05.153 and the King County Involuntary Treatment Act (“ITA”), police officers may restrain individuals that they believe present a danger to themselves or others due to mental health and/or substance use disorders, to the extent necessary to detain and transfer the individual to a medical or mental health facility.</p> <p>RCW 71.05.153(2)</p>
<p>12 No. 14 The crime of assault with a deadly weapon is a felony. 13 WPIC 2.09 14 RCW 9A.36.021(1)(c), (2)(a)</p>	<p>No.</p> <p>A person or public or private entity employing a person is not civilly or criminally liable for performing duties under this chapter if the duties were performed in good faith and without gross negligence.</p> <p>RCW 70.96B.060 (1) Exemption from liability (Effective until April 1, 2018.)</p>

<p>1 No. 15 2 “Probable cause” means facts known to the officer at 3 the time, that would cause a reasonably cautious 4 officer to believe the proposition at issue. In 5 determining whether the facts known to the officer 6 justified this belief, you may take into account the 7 officer's experience and expertise.</p>	<p>No. “Good faith” means that the officer honestly believed his or her action was not unlawful as defined in Instruction No. ____ [reference 1st instr] RCW 9A.16.020 (1) & (6)]</p>
<p>6 No. 16 7 "Deadly weapon" shall include any weapon, device, 8 instrument, which, under the circumstances in which 9 it is used, attempted to be used, or threatened to be 10 used, is readily capable of causing death or substantial 11 bodily harm. 12 WPIC 2.06; WPIC 2.06.01 13 RCW 9A.04.110 (6)</p>	<p>No. “Gross negligence” is the failure to exercise slight care. It is negligence that is substantially greater than ordinary negligence. Failure to exercise slight care does not mean the total absence of care but care substantially less than ordinary care. WPI 10.07</p>
<p>12 No. 17 13 “Necessary” or “necessarily” means that, under the 14 circumstances as they appeared to the actor at the 15 time, (1) no reasonably effective alternative to the use 16 of force appeared to exist and (2) the amount of force 17 used was reasonable to effect the lawful purpose 18 intended. 19 WPIC 16.05</p>	<p>No. If you find that an officer’s actions were “necessary” to effect the lawful purpose intended, you must find that the officer did not act with criminal means. RCW 9A.16.020(1)</p>
<p>16 No. 18 17 If you find that an officer’s use of force was not 18 justifiable, then you must decide whether the officer 19 acted with malice and not in good faith. 20 RCW 9A.16.040(3)</p>	<p>No. If you find that an officer’s detention of Mr. Fredericks was “in good faith” and without “gross negligence”, you must find that the officer did not act with criminal means. RCW 9A.16.020(6); RCW 70.96B.060</p>
<p>21 No. 19 22 “Malice” means an evil intent or design to injure 23 another person. Malice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another. WPIC 2.14</p>	<p>No. In determining whether an officer acted out of necessity, in good faith, and/or without gross negligence, you may consider, among other things, whether the</p>

	<p>officer’s actions were compliant with applicable Seattle Police Department policy and/or training. However, you may not rely solely on an officer’s failure to comply with Seattle Police Department policy and/or training in making this determination.</p>
<p>No. 20 “Good faith” means that the officer honestly believed his or her action was justifiable as that term is defined in Instruction Nos. 11 and 12 above.</p>	<p>No.</p> <p>The burden of disproving the affirmative defense of lawful force under RCW 9A.16.020 beyond a reasonable doubt falls on the State.</p> <p>WPIC 17.01; WPIC 1703</p>
<p>No. 21 In determining whether an officer acted with malice or not in good faith you may consider, among other things, whether the officer’s actions were compliant with applicable Seattle Police Department policy and/or training. However, you may not rely solely on an officer’s failure to comply with Seattle Police Department policy and/or training to find that the officer acted with malice or not in good faith.</p>	<p>No.</p> <p>If you find by a preponderance of the evidence that an officer’s actions caused Mr. Frederick’s death and were not necessary to carry out the officer’s lawful purpose, you must find that the death was caused by criminal means and you must specifically identify each officer who so acted.</p>
<p>No. 22 A death caused by an officer using deadly force is committed by criminal means if the use of deadly force was not justifiable, and the officer’s use of such force was with malice and was not in good faith. A death caused by an officer using deadly force is committed by criminal means if</p> <ol style="list-style-type: none"> 1. The use of deadly force was not justifiable, and the officer’s use of such force was with malice; or 2. The use of deadly force was not justifiable, and the officer’s use of force was not in good faith. <p>If you find by a preponderance of the evidence that either 1) or 2) is true, then you must find that the</p>	<p>No.</p> <p>If you find by a preponderance of the evidence that an officer’s actions in detaining Mr. Fredericks for involuntary commitment caused his death, were not in good faith and the officer was grossly negligent, you must find that the was caused by criminal means and you must specifically identify each officer who so acted.</p>

1 death was caused by criminal means and you must
2 specifically identify each officer who so acted.

3 The instructions included and cited above are under the appropriate rubric of an inquest
4 as related to analysis of force by a police officer. Those currently proposed are not.

4 **D. Conclusion and Request**

5 By way of RCW 9A.16.020, the legislature has specifically and intentionally afforded
6 police officers the *right* to use force under certain circumstances in order to do their specialized
7 jobs, also providing that the State has the burden to disprove such defense beyond a reasonable
8 doubt. It would be highly prejudicial to the Officers if the Administrator were to present jury
9 instructions including improper factual assumptions, rather than instructions consistent with the
10 pattern instructions intended by the Supreme Court to apply to matters subject to RCW
11 9A.16.020. The Officers respectfully request the Administrator instruct the jury as outlined
12 above, consistent with their statutory rights as described herein.

11 DATED this 14th day of September, 2022, at Seattle, Washington.

12 FREY BUCK, P.S.

13 By: /s/ Karen L. Cobb
14 Ted Buck, WSBA #22029
15 Karen L. Cobb, WSBA #34958
16 Attorneys for Seattle Police Department
17 Involved Officers
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