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6 KING COUNTY DEPARTMENT OF EXECUTIVE SERVICES
7 INQUEST PROGRAM

8 IN RE INQUEST INTO THE DEATH OF
9 CHARLEENA LYLES

No. 517IQ9301

10 INVOLVED OFFICERS' REPLY RE
11 APPLICATION OF RCW 9A.040 AND RCW
12 9A.16.050 IN THE ADMINISTRATOR'S
INSTRUCTIONS TO THE INQUEST JURY
PANEL

13 The involved officers submit this direct reply to the family's brief regarding application of
14 the former RCW 9A.16.040 and RCW 9A.16.050 in the Administrator's instructions to the jury.

15 **1. Revised RCW 9A.16.040 cannot be applied retroactively in instructing the jury on**
16 **the question of criminal means.¹**

17 As a general rule, courts presume that statutes operate prospectively unless contrary
18 legislative intent is express or implied. Courts disfavor retroactivity because of the unfairness of
19 impairing a vested right or creating a new obligation with respect to past transactions. *Department*
20 *of Social & Health Servs v. Olver (In re Estate of Burns)*, 131 Wn.2d 104, 110, 928 P.2d 1094, 1096
21 (1997) (internal citations omitted). A statute has a genuinely retroactive effect if it impairs rights a
22 party possessed when he acted, increases his liability for past conduct, or imposes new duties with
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25 ¹ I-940, out of which the revisions to RCW 9A.16.040 arose, was not passed until well after the events of June 18, 2017.

1 respect to completed transactions. *Id.*, citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S. Ct.
2 1483, 1500, 128 L. Ed. 2d 229 (1994).

3 Specific to the criminal context, the law in effect at the time an alleged criminal offense is
4 committed controls disposition of the case. *State v. Putman*, 21 Wn. App. 2d 36, 52, 504 P.3d 868,
5 876 (2022), citing *State v. Schmidt*, 143 Wn.2d 658, 673-674, 23 P.3d 462, 471 (2001). Ex post facto
6 prohibitions apply to statutes which are "criminal" or "punitive." *Id.*, 674. Prohibition against ex
7 post facto legislation is found both in U.S. Const. art. 1, § 9 and Const. art. 1, § 23. Section 23 of the
8 Washington State Constitution contains the same prohibition.

9 The U.S. Supreme Court, in *Calder v. Bull*, 3 U.S. 386, 1 L. Ed. 648 (1978), established the
10 framework for ex post facto analysis. A portion of the *Calder* analysis was adopted by Washington
11 courts and applied to the Washington constitutional ex post facto prohibition. *State v. Edwards*, 104
12 Wn.2d 63, 70-71, 701 P.2d 508, 511-512 (1985), citing *Johnson v. Morris*, 87 Wn.2d 922, 927, 557
13 P.2d 1299, 1303 (1976). A law violates the ex post facto prohibition if it aggravates a crime or
14 makes it greater than it was when committed; permits imposition of a different or more severe
15 punishment than was permissible when the crime was committed; or changes the legal rules to permit
16 less or different testimony to convict the offender than was required when the crime was
17 committed. *Calder, supra*, at 390. Legislation further violates the provision if it is made retroactive
18 and disadvantages the [alleged] offender. *Weaver v. Graham*, 450 U.S. 24, 29, 67 L. Ed. 2d 17, 101
19 S. Ct. 960 (1981). Finding a violation turns upon whether the law changes legal consequences of
20 acts completed before its effective date. *Id.*, at 31.

21
22 Pursuant to long-standing constitutional precedent re the prohibition of ex post facto laws,
23 the involved officers could never be criminally tried under the current, revised RCW 9A.16.040.
24 While an inquest is not ultimately a criminal proceeding, it would be pointless to have the inquest
25

1 jury in its fact-finding role review the case and determine the facts under a different standard than
2 that a prosecutor would be required to apply. Based upon the above factors, the involved officers in
3 this matter—and any other arising out of events that occurred before implementation of the
4 legislation brought on by the passage of I-940—are absolutely and statutorily entitled to a
5 determination of whether the officer(s) acted “without malice” and “with a good faith belief that
6 such act is justifiable.” The inquest process has already established this precedent in the Butts
7 inquest.

8 **2. Beltran Serrano is inapplicable as to the malice requirement as the ruling applied**
9 **in a civil, not criminal, context.**

10 The ruling in *Beltran-Serrano v. City of Tacoma*, which referred to only the good faith
11 standard, not absence of malice, is not applicable in a criminal context. 193 Wn.2d 537, 548, 442
12 P.3d 608, 613 (2019). *Beltran-Serrano*, and each of the 20 cases citing it since its publication, has
13 been a civil case with claims sounding in tort. Civil statutes are not subject to the ex post facto
14 analysis. *In re Estate of Haviland*, 177 Wn.2d 68, 81-82, 301 P.3d 31, 38 (2013) (rejecting the
15 argument that applying the financial abuse statutes in a probate action would violate the ex post facto
16 clauses of U.S. CONST. art. I, § 10; WASH. CONST. art. I, § 23):

17
18 This clause pertains to criminal and penal statutes that punish past or future conduct. *State*
19 *v. Schmidt*, 100 Wn. App. 297, 299, 996 P.2d 1119 (2000), *aff’d*, 143 Wn.2d 658, 23 P.3d
20 462 (2001). However, “the slayer statute is not a criminal statute. Its origins are in equity.” *In*
21 *re Estate of Kissinger*, 166 Wn.2d 120, 131, 206 P.3d 665 (2009). Likewise, the abuser
statutes are civil and simply prevent one from profiting by his own wrongful
actions. *Cf. Tyler*, 140 Wash. at 687 (citing *Perry v. Strawbridge*, 209 Mo. 621, 108 S.W.
641 (1908)).

22 *Id.*, at 82. The Administrator’s instructions to the jury must reference the RCW 9A.16.040 language
23 in place at the time of the officers’ encounter with Ms. Lyles in 2017.

24 **3. The officers are also entitled to an instruction under RCW 9A.16.050.**
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1 The legislature has recognized that there are dual standards of self-defense in Washington,
2 namely RCW 9A.16.040 (affecting law enforcement officers) and RCW 9A.16.050 (affecting
3 civilians). Police officers do not cease being citizens when they are on the job. While there use of
4 force in enforcement activities as police officers is directed by .040, their fundamental right to self-
5 defense when they are being attacked also applies. Police officers do not waive this fundamental
6 right by putting on a badge. The State House of Representatives Public Safety Committee explicitly
7 confirmed that fact in its Bill Analysis on HI-940:

8 Whether a law enforcement officer is criminally culpable for using deadly force depends on the
9 specific statutory crime alleged and any applicable defense, in the context of the underlying
10 harm to the other person. A law enforcement officer has the same right of self-defense as others.
11 Law enforcement officers are also statutorily authorized to use deadly force in additional
12 circumstances.

13 See Appx 1, p. 2, ¶ 5. Any person suspected of the homicide of another is entitled to the benefit of
14 RCW 9A.16.050, which justifies a homicide committed under the circumstances laid out therein.
15 Officers Anderson and McNew absolutely had reasonable ground to “apprehend a design on the part
16 of” Ms. Lyles to commit a felony [assault in the third degree] or to do great personal injury to one
17 or the other of them in imminent fashion. They are entitled to both sets of instructions.

18 DATED 28th day of June 2022.

19 FREY BUCK, P.S.

20 By: Karen L. Cobb
21 Ted Buck, WSBA #22029
22 Karen L. Cobb, WSBA #34958
23 Attorneys for Officer Steven McNew and Officer
24 Jason Anderson
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Public Safety Committee

HI 940

Brief Description: Law enforcement.

Sponsors: People of the State of Washington.

Brief Summary of Bill

- Requires law enforcement officers to complete de-escalation training and mental health training.
- Establishes state policy requiring law enforcement personnel to render first aid.
- Modifies the criminal liability standard for law enforcement officers using deadly force.
- Requires independent investigations of certain incidents involving a law enforcement officer's use of deadly force.

Hearing Date: 2/20/18

Staff: Kelly Leonard (786-7147).

Background:

Law Enforcement Training.

The Criminal Justice Training Commission (CJTC) provides training and educational programs to law enforcement, corrections officers, and other public safety professionals in Washington. The CJTC also certifies, and when necessary de-certifies, peace officers.

Basic law enforcement officer training is required of all law enforcement officers, with the exception of volunteers and reserve officers. The CJTC Basic Law Enforcement Academy (BLEA) consists of a 720-hour program covering a variety of subjects, including criminal law and procedures, traffic enforcement, cultural awareness, communication and writing skills, emergency vehicle operations, firearms, crisis intervention, patrol procedures, and criminal investigation and defensive tactics. Alternatively, the Washington State Patrol (WSP) maintains

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

a separate academy for state troopers. State troopers must complete the Trooper Basic Training Class, which contains requirements and components comparable to BLEA.

In addition to basic training, the CJTC and WSP provide specialized training to commissioned officers on a range of subjects, such as crisis recognition and intervention, and interacting with persons with a developmental disability or mental illness.

In 2015 the state established mandatory crisis intervention training for all law enforcement officers. Crisis intervention training refers to training designed to provide tools and resources to law enforcement officers in order to respond effectively to individuals who may be experiencing an emotional, mental, physical, behavioral, or chemical dependency crisis or problem, and designed to increase the safety of both law enforcement and individuals in crisis. The CJTC is required to provide full-time law enforcement officers with a minimum of eight hours of crisis intervention training. In addition, the CJTC is directed to have 25 percent of all certified officers on patrol duties complete 40 hours of enhanced crisis intervention training by December 1, 2019.

State Law on Use of Deadly Force by Law Enforcement Officers.

Deadly force is the intentional application of force through the use of firearms or any other means reasonably likely to cause death or serious physical injury.

Whether a law enforcement officer is criminally culpable for using deadly force depends on the specific statutory crime alleged and any applicable defense, in the context of the underlying harm to the other person. A law enforcement officer has the same right of self-defense as others. Law enforcement officers are also statutorily authorized to use deadly force in additional circumstances.

Homicide or use of deadly force by a law enforcement officer does not constitute a crime if it meets the statutory standard, which provides that such force is legally justifiable in any of the following contexts:

1. when acting in obedience to the judgment of a competent court;
2. when necessarily used to overcome actual resistance to the execution of a legal process, mandate, or order of a court or officer, or in the discharge of a legal duty; or
3. when necessarily used to:
 - arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony;
 - prevent the escape of a person from a federal or state correctional facility or in retaking a person who escapes from such a facility;
 - prevent the escape of a person from a county or city jail or holding facility if the person has been arrested for, charged with, or convicted of a felony; or
 - lawfully suppress a riot if the actor or another participant is armed with a deadly weapon.

In considering whether to use deadly force to arrest or apprehend any person for the commission of any offense, a peace officer must have probable cause to believe that the suspect poses a threat of serious physical harm to the officer or others if he or she is not apprehended. "Threat of serious physical harm" includes, but is not limited to, when the suspect threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening, or when there is probable cause to believe that the suspect has committed any crime

involving the infliction or threatened infliction of serious physical harm. Under these circumstances, deadly force may also be used if necessary to prevent escape from the officer, as long as some warning is given when feasible.

In addition to delineating the circumstances where deadly force is authorized, the statutory standard specifies that a peace officer may not be held criminally liable for using deadly force when it is used without malice and with a good faith belief that the use is permitted under the statutory standard.

Constitutional Duties and Other Civil Liability.

Apart from criminal liability of law enforcement officers, state and local agencies may be liable for civil damages in certain circumstances where an officer's actions rise to a violation of constitutional rights. Under a federal statute commonly referred to as "section 1983," courts may impose monetary damages if a person's federal constitutional rights are violated. The Fourth Amendment of the United States Constitution (Constitution) protects citizens from excessive force by the government. In interpreting the Fourth Amendment, the United States Supreme Court has held that whether a law enforcement officer uses excessive force is determined based on if he or she was objectively reasonable in light of the circumstances confronting him or her.

The Eighth Amendment of the Constitution protects citizens from cruel and unusual punishment. The Fourteenth Amendment extends these protections to persons being detained prior to a criminal conviction. Federal and state courts have interpreted these provisions as prohibiting the government from acting with deliberate indifference to the medical needs of detained and incarcerated persons.

State and local agencies may also be civilly liable for monetary damages under the common law of torts. In general, state tort law imposes a duty upon everyone to use reasonable care when his or her actions create a foreseeable risk of harm to others. However, the public duty doctrine limits government liability for negligence unless there is a duty owed to an individual, as opposed to the general public. The public duty doctrine in turn is subject to four exceptions where liability may nonetheless arise: a legislatively created duty to protect a particular class of persons; failure to enforce a statute; failure to exercise reasonable care when engaging in volunteer rescue efforts; and circumstances with a special relationship to an individual.

Summary of Bill:

Law Enforcement Training.

All law enforcement officers must receive violence de-escalation training and mental health training through the CJTC. The de-escalation training must educate officers on the good faith standard for use of deadly force established under the initiative and how the standard advances violence de-escalation goals. In developing curricula for the training programs, the CJTC must consider the following:

- de-escalation in patrol tactics and interpersonal communication training, including tactical methods that use time, distance, cover, and concealment, to avoid escalating situations that lead to violence;
- alternatives to jail booking, arrest, or citation in situations where appropriate;
- implicit and explicit bias, cultural competency, and the historical intersection of race and policing;

- skills including de-escalation techniques to effectively, safely, and respectfully interact with people with disabilities or behavioral health issues;
- "shoot/don't shoot" scenario training;
- alternatives to the use of physical or deadly force so that deadly force is used only when unavoidable and as a last resort;
- mental health and policing, including bias and stigma; and
- using public service, including rendering of first aid, to provide a positive point of contact between law enforcement officers and community members to increase trust and reduce conflicts.

The CJTC may provide the training programs, partner with private parties or law enforcement agencies, or authorize private parties or law enforcement agencies to provide the training. An entity providing training may charge a reasonable fee.

A law enforcement officer commencing employment after the effective date of the initiative must successfully complete both training programs within the first 15 months of employment. Other law enforcement officers must successfully complete the training by a date established by the CJTC. Law enforcement officers must periodically receive continuing violence de-escalation training and mental health training for practicing relevant skills and updating their knowledge on relevant issues.

Within six months after the effective date of the initiative, the CJTC must consult with law enforcement agencies and community stakeholders and adopt rules for carrying out the training requirements. The rules must, at a minimum:

- adopt training hour requirements and a curriculum for initial violence de-escalation training;
- adopt training hour requirements and a curriculum for initial mental health training, which may include all or part of the mental health training curricula established under current training for interacting with persons with a developmental disability or mental illness as well as crisis intervention;
- adopt training hour requirements and curricula for continuing training;
- establish means by which law enforcement officers will receive the required training; and
- require compliance with the training requirements as a condition of maintaining certification.

Law Enforcement Duty to Render First Aid.

It is state policy that all law enforcement personnel must render first aid to save lives.

The CJTC, in consultation with the WSP, the Washington Association of Sheriffs and Police Chiefs, organizations representing state and local law enforcement officers, health providers and/or health policy organizations, tribes, and community stakeholders, must develop guidelines for implementing the duty to render first aid. The guidelines must:

- adopt first aid training requirements;
- assist agencies and law enforcement officers in balancing competing public health and safety duties; and
- establish that law enforcement officers have a paramount duty to preserve the life of persons whom the officer comes into direct contact with while carrying out official

duties, including providing or facilitating immediate first aid to those in agency care or custody at the earliest opportunity.

Guidelines must be developed within one year after the effective date of the initiative.

Law Enforcement Use of Deadly Force.

Except for circumstances where an officer uses deadly force in obedience to the judgment of a competent court, the protection against criminal liability for using deadly force without malice is removed. Instead, protection against criminal liability is provided only when the use of deadly force is authorized under the current standard and the law enforcement officer meets a good faith standard. The good faith standard is met only if the officer meets both the objective good faith test and subjective good faith test.

The objective good faith test is met if a reasonable officer, in light of all of the facts and circumstances known to the officer at the time, would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual.

The subjective good faith test is met if the officer intended to use deadly force for a lawful purpose and sincerely and in good faith believed that the use of deadly force was warranted in the circumstance.

Independent Investigations of Law Enforcement Use of Deadly Force.

If deadly force results in death, great bodily harm, or substantial bodily harm, an independent investigation must be completed to inform the determination of whether the use of deadly force met the objective good faith test and satisfied other applicable laws and policies. Rules adopted by the CJTC must require investigations to be carried out completely independent of the agency whose officer was involved in the use of deadly force. If deadly force was used on a tribal member, investigative procedures must include consultation with the member's tribe and, where appropriate, sharing information with such tribe.

Criminal Justice Training Commission Rulemaking.

The CJTC must adopt rules necessary for carrying out specified requirements within one year after the effective date of the initiative, unless a different deadline is specified. The CJTC must consider the use of negotiated rulemaking.

In carrying out rulemaking, the CJTC must seek input from the Attorney General, law enforcement agencies, tribes, and community stakeholders. Where involvement of community stakeholders is required, input must be sought from organizations advocating for: persons with disabilities; members of the lesbian, gay, bisexual, transgender, and queer community; persons of color; immigrants; non-citizens; native Americans; youth; and formerly incarcerated persons.

Other Provisions.

The initiative must be liberally construed to effectuate its intent, policies, and purposes. Local jurisdictions or law enforcement agencies are not precluded from enacting additional training requirements or requiring law enforcement officers to provide first aid in more circumstances.

Appropriation: None.

Fiscal Note: Requested on February 13, 2018.