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IN THE SUPERIOR COURT OF THE STATE OF
IN AND FOR THE COUNTY OF KING

Inquest into the death of
CURTIS ELROY TADE,

No. 17IQ61739

CITY’S SUPPLEMENTAL
MEMORANDUM REGARDING
INSTRUCTION 18 (CRIMINAL MEANS)

I. INTRODUCTION

The City objects to proposed Instruction No. 18 defining “criminal means.” The instruction does not accurately reflect the text and meaning of the law in effect at the time, and completely rewrites the statute.

II. LEGAL ANALYSIS

The City joins the Involved Officer in his opposition to this instruction as set forth in his briefing of January 6, 2023 and May 26, 2023. In addition, the City offers the following analysis.

A. The Nelson Inquest Properly Charged the Panel

The Inquest Administrator did not charge the panel in this manner in the recent Eugene Nelson inquest. IT properly applied the law. *See attached.*

B. The Proposed Instruction Improperly Eliminates the “Malice” Prong.

An obvious question is why would the 1986 Legislature have allowed an officer to be charged with murder if he acted with malice (a very difficult standard to meet), *or*

1 without good faith (much easier to prove). The answer is that it did not. The law required
2 *both* prongs to be met. Otherwise the malice standard is superfluous. The statute in effect at
3 the time of this incident stated:

4 A public officer or peace officer shall not be held criminally liable for
5 using deadly force without malice and with a good faith belief that such
6 act is justifiable pursuant to this section.

7 Former RCW 9A.16.040(3) (*Laws of 1986*, Ch. 209). Allowing the panel to decide that an
8 officer committed a crime by acting with malice *or* without good faith eliminates the malice
9 standard.

10 Since at least 1975, the Legislature has defined “malice” for purposes of the criminal
11 statutes as follows:

12 "Malice" and "maliciously" shall import *an evil intent, wish, or design* to
13 vex, annoy, or injure another person. Malice may be inferred from an act
14 done in willful disregard of the rights of another, or an act wrongfully
15 done without just cause or excuse, or an act or omission of duty betraying
a *willful disregard* of social duty;

16 RCW 9A.04.110(12) (emphasis supplied). This section remains in its original form. See,
17 *Laws of 1975*, Ch. 260.

18 As Officer Cox points out, previously there was not a definition of “good faith” in
19 the criminal statutes. The 2019 statute added this definition:

20 A peace officer shall not be held criminally liable for using deadly force in
21 good faith, where "*good faith*" is an *objective standard* which shall
22 consider all the facts, circumstances, and information known to the officer
23 at the time to determine whether a similarly situated reasonable officer
would have believed that the use of deadly force was necessary to prevent
death or serious physical harm to the officer or another individual.

24 RCW 9A.16.040(4), Justifiable Homicide, *Laws of 2019*, Ch. 4, §3 (emphasis supplied).

25 Thus, malice is a subjective standard and good faith is an objective standard. Malice
26 involves intent; while the absence of good faith is more akin to negligence. These are
27

1 vastly different standards.

2 While not directly applicable, the 2019 statutory definition of “good faith” largely
3 tracks U.S. Supreme Court precedent on Fourth Amendment “reasonableness” in the use of
4 force context. The Supreme Court has explained the wide gulf between bad faith and
5 malice.

6
7 As in other Fourth Amendment contexts, however, the “reasonableness”
8 inquiry in an excessive force case is an objective one: the question is
9 whether the officers' actions are “objectively reasonable” in light of the
10 facts and circumstances confronting them, without regard to their
11 underlying intent or motivation. *An officer's evil intentions will not make a
Fourth Amendment violation out of an objectively reasonable use of force;
nor will an officer's good intentions make an objectively unreasonable use
of force constitutional.*

12 That test [*Johnson v. Glick*], which requires consideration of whether the
13 individual officers acted in “good faith” or “maliciously and sadistically
14 for the very purpose of causing harm,” is incompatible with a proper
15 Fourth Amendment analysis. We do not agree with the Court of Appeals'
16 suggestion, that the “malicious and sadistic” inquiry is merely another way
17 of describing conduct that is objectively unreasonable under the
18 circumstances. * * * *The Fourth Amendment inquiry is one of “objective
19 reasonableness” under the circumstances, and subjective concepts like
20 “malice” and “sadism” have no proper place in that inquiry.*

21 *Graham v. Connor*, 490 U.S. 386, 397–99 (1989) (citations omitted) (emphasis supplied).

22 The Washington Legislature in 1986 declared in no uncertain terms that an officer
23 cannot be charged with murder for not acting in good faith. Malice must be proven. The
24 proposed instruction completely disregards that legislative intent.

25 **C. The Prosecuting Attorney Historically Did Not Charge Officers Unless
26 Malice Could Be Proven.**

27 As the Involved Officer points out, the King County Prosecutor’s charging decisions
were historically based on the “malice” standard. Mssrs. Maleng and Satterberg often stated
they could not charge officers with murder because they had to always prove “malice.” For
example, in the Charleena Lyles matter the prosecutor clearly stated *both* prongs had to be

1 disproven by the state, not just good faith:

2
3 In a memorandum, Satterberg wrote that in order to prosecute the officers
4 for any degree of homicide, *the state would have to disprove justifiable
5 homicide under the "malice" and "good faith" standards.* There is "no
6 evidence to overcome this defense," Satterberg wrote.

7 *King County prosecutor will not file charges against the officers who shot, killed Charleena*
8 *Lyles, KING5.com, July 21, 2022 (emphasis supplied).¹ Lyles was shot in 2017.*

9 Likewise in the 2011 shooting of John T. Williams, the prosecutor declined to charge
10 Officer Birk, stating publicly:

11 Calling the shooting "troubling," Satterberg said that the "obvious and
12 legally available defenses" -- chiefly that there is no evidence indicating
13 Birk acted with malice toward Williams, as required by state law -- would
14 leave a jury with only one decision if asked to convict Birk.

15 *No charges in woodcarver shooting by Seattle police officer, Seattle PI, February 15, 2011.²*

16 **D. The 1986 Statute Was Amended for the Specific Purpose of Removing
17 The "Malice" Defense: If Murder Could Be Proved By The Absence of Good
18 Faith, There Would Have Been No Reason To Change The Law.**

19 The proposed instruction applies current law, completely disregarding the history of
20 the applicable statute. In 2018, the community demanded the malice standard be removed --
21 there was no issue with the good faith prong. The specific purpose of Initiative 940
22 (ultimately becoming legislation) was to eliminate the "malice" defense in justifiable
23 homicide cases.

24 Law Enforcement Use of Deadly Force. Except for circumstances where
25 an officer uses deadly force in obedience to the judgment of a competent
26 court, *I-940 removes the protection against criminal liability for using
27 deadly force without malice.*

Final Bill Report, HB 3003 (emphasis supplied).

¹ <https://www.king5.com/article/news/local/seattle/no-charges-officers-charleena-lyles/281-d2b573ce-47b2-4ae6-af0a-72d141d9c3ea>

² <https://www.seattlepi.com/local/article/No-charges-in-woodcarver-shooting-by-Seattle-1016227.php>

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III. CONCLUSION

The proposed instruction is legally erroneous. Allowing a finding of “criminal means” by the mere absence of good faith rewrites the statute and follows the 2019 amendments instead.

DATED: June 1, 2023

KEATING, BUCKLIN & McCORMACK, INC., P.S.



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1 **DECLARATION OF SERVICE**

2 I declare under penalty of perjury under the laws of the State of Washington that on
3 June 1, 2023, a true and correct copy of the foregoing was served upon the parties
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DATED this _____ day of June, 2023, at Seattle, Washington.

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