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7 **THE STATE OF WASHINGTON**
8 **KING COUNTY DEPARTMENT OF EXECUTIVE SERVICES**

9
10 *IN RE*: THE INQUEST INTO THE
11 DEATH OF DAMARIUS BUTTS

NO. 517IQ8013

12 THE FAMILY'S RESPONSE TO SPD
13 AND THE INVOLVED OFFICERS'
14 RECOMMENDATIONS RE THE SCOPE
OF INQUEST HEARING

15 The Butts Family respectfully provides the below responses to the Seattle Police
16 Department's and the Involved Officers¹ proposals regarding limits on the scope of the inquest
17 proceedings:

18 **A. SPD's Request to Limit Assessment of Involved Officers' Actions is Unreasonable**

19 The Inquest Administrator should reject SPD's argument for the exclusion of any and all
20 references or analysis of SPD policies or trainings the Involved Officers may or may not have
21 adhered to during the foot pursuit, the confrontation with Mr. Butts in the loading dock, and the
22 Involved Officer's other actions that lead to the death of Mr. Butts.

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24 ¹ The Involved Officers include Elizabeth Kennedy, Joshua Vaaga, Canek Gordillo, and Christopher Myers.

1 The purpose of the inquest is to answer the question: “[W]hether the law enforcement
2 member[s] acted pursuant to policy and training” when they killed the community member. Appx.
3 A at 2.2. To answer that question, all actions the Involved Officers took in relation to Mr. Butts
4 must be assessed. The Involved Officers’ actions “leading up to . . . the death” were the proximate
5 cause of Mr. Butts’ death—including chasing Mr. Butts into the Federal Building and confronting
6 Mr. Butts when he was in a locked room. These actions should be assessed for their compliance
7 with SPD policies and training. There may be instances where reviewing the actions of the
8 involved officers may need to be limited due to extensive interactions or intervening causes of
9 events. However, this is not one of those cases. In this instance, the need for a full assessment of
10 the Involved Officers interactions with Mr. Butts is clear. Each of the Involved Officers had limited
11 interactions with Mr. Butts that consisted of chasing him to the Federal Building and engaging in
12 a firefight wherein Mr. Butts was killed. The limited scope of the interaction and the clear line of
13 causation show that the Involved Officers’ actions relating to Mr. Butts prior to the shooting,
14 including the foot pursuit, are directly tied to Mr. Butts’ death. As such, assessing the whether the
15 Involved Officers actions comported with SPD policy and training, during all of their interactions
16 with Mr. Butts, is necessary, is critical and should not be avoided.

17 SPD’s argument does nothing to undercut this position. SPD’s sole basis for requesting to
18 exclude actions prior to the shooting from assessment for compliance with SPD policy and training
19 is that “[s]uch an inquiry would render the non-shooting officers as potential subject officers,
20 confusing the issues before the fact-finder.” SPD Mot. at 2. This argument misses the mark. The
21 Involved Officers’ actions relating to Mr. Butts leading to and up until his death must be examined
22 to ensure that their actions did not violate SPD policy and training and thereby create an escalated
23 situation where the involved officers felt the need to use deadly force. Further, the Family is not

1 requesting that the non-Involved Officers’ actions be assessed for compliance with SPD policies
2 and trainings.² SPD’s request to keep the Panel from inquiring about the Involved Officers’
3 compliance with SPD policies and trainings in their interaction with Mr. Butts should be rejected.

4 **B. SPD and the Involved Officers’ Request to Limit Inquiry to SPD’s Use of Force Policy
Is Unreasonable**

5 SPD and the Involved Officers argue that “[t]he only policy relevant to the cause and
6 manner” of Mr. Butts’ death is SPD’s Use of Force policy. This, however, ignores two fundamental
7 questions to be answered by the inquest: (1) whether the Involved Officers acted in accordance
8 with SPD policies and training in the encounter; and (2) whether SPD policies and trainings would
9 have directed the Involved Officers to take some other action that might have avoided the use of
10 deadly force. By assuming that the only policy of import is the Use of Force or Use of Deadly
11 Force policy, SPD’s and the Involved Officers’ requests presume the outcome—that use of deadly
12 force was unavoidable. As such, if granted, SPD’s and the Involved Officers’ request would
13 preemptively bar the Family, the Administrator, and the Panel from receiving and exploring
14 information related to SPD policies that may or should have informed and directed the Involved
15 Officers’ actions in ways that could have avoided a fatal outcome and the loss of a family member.
16 This request cannot be granted without undermining the purpose of the inquest. Appx. 1 at 2.1. If
17 granted the request would set the dangerous precedent that when SPD officers use deadly force
18 against an individual the inquest process could *never* examine or determine whether the officers’
19 decisions that lead to the incident were consistent with SPD policy and training outside of the Use
20 of Force policy—not even policies meant to avoid the use of deadly force. This cannot be allowed.
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23 ² There may be instances where such an exploration may be required. This is not the case here as the Family isn’t
24 requesting review of the non-Involved Officers’ actions—unless Officers Merritt or Palmer are allowed to testify.

1 Indeed, a fair and transparent inquest cannot proceed on the basis of such a presumption and if it
2 does, the inquiry is nothing more than a rubber stamp justifying the actions of police officers.

3 SPD and the Involved Officers’ argument also ignores the fact that the Family has
4 requested that only a narrow subset of relevant SPD policies be the subject of this inquest. The
5 Family requested only policies that were or should have been invoked during the officers’
6 encounter with Mr. Butts. Allowing the Family to explore these policies during discovery, and the
7 Panel to consider these policies, is the most transparent method of determining whether the
8 Involved Officers acted pursuant to all applicable SPD policies. Further, it is well within the
9 province of the Panel to determine what policies are relevant to determining whether the Involved
10 Officers acted according to SPD policies and trainings when they killed Mr. Butts.

11 Allowing SPD and the Involved Officers to determine what policies under which they want
12 the Involved Officers’ actions examined and barring inquiry into other policies and training that
13 may have impacted the outcome of the police interaction with Mr. Butts would undermine the full
14 and transparent process guaranteed in the inquest and community faith in the process—especially
15 where SPD and the Involved Officers only want their actions scrutinized under one policy. Such a
16 decision would also invade the province of the Panel, which is tasked with separating the wheat
17 from the chaff and determining what policies and trainings are relevant for understanding the
18 involved officers’ actions. SPD and the Involved Officers’ request to narrow the inquest to just the
19 SPD Use of Force policy must be rejected to guarantee a transparent, independent, and fair inquiry.

1 **C. SPD and Involved Officers’ Request to Limit Inquiry to Three SPD Training**
2 **Protocols Is Unreasonable**

3 SPD argues that only three SPD training protocols should be part of the inquest: (1) use of
4 force; (2) care under fire; and (3) contact/cover.³ This argument is flawed and ignores an important
5 basic principle that SPD identified: “there is no single training that can be identified as the closed
6 universe of training and experience from which officers draw[.]” SPD Mot. at 4. As SPD admits
7 its officers utilize a range of training while performing their duties, SPD has no basis for its
8 proposal for limiting training protocols explored during the inquest to just three. Further, SPD
9 offers no basis for such a limitation other than it would prefer not to have to address how the
10 involved officers’ trainings in other areas may have impacted the shooting death of Mr. Butts. This
11 is self-serving and not a basis for excluding such information regarding other SPD training or
12 barring the Panel from considering such evidence. The Involved Officers’ similar requests fails for
13 the same reasons.

14 **D. The Involved Officers’ Request for Live Testimony Regarding the Initiating Incident**
15 **Should Be Rejected**

16 After arguing that Involved Officers’ actions outside of the moment of shooting Mr. Butts
17 should not be reviewed for compliance with SPD policies and trainings, they now argue that they
18 should be allowed to proffer evidence regarding “[t]he events that precipitated the call to law
19 enforcement (i.e., the 7-11 incident), law enforcement and civilian interaction with Butts in
20 downtown Seattle (i.e., struggle with Officer Merritt and police chase), and law enforcement and
21 civilian interaction with Butts in the Federal Building.” Involved Officers Mot. at 3. This request
22 is self-serving, would lead to redundant and cumulative witness testimony, and if granted would
23 unnecessarily broaden the scope of the inquest. *See* Appx. 2 at 12.4.

24 ³ SPD briefing requests that the Administrator limit the inquiry into *four* trainings but only identifies three.

1 *First*, the events that “precipitated the call to law enforcement” are uncontested. The
2 Family, consistent with the inquest rules and the need to narrow the inquest, is willing to stipulate
3 to facts regarding the burglary and Damarius Butts’ possession of a firearm. *See* Appx. 2 at 5.3.
4 As such, live testimony is unnecessary.

5 *Second*, live testimony on these topics is unnecessary because the Involved Officers did
6 not have any first-hand knowledge of the incident at 7-Eleven or the Butts’ interaction with Officer
7 Merritt. The purpose of the inquest is to determine whether the Involved Officers comported with
8 SPD policies and training, and providing evidence of which the Involved Officers were unaware
9 will only confuse the fact-finder and inject irrelevant information into the proceedings. Further,
10 evidence regarding the incident at 7-Eleven is evidence of Mr. Butts engaging in criminal activity
11 and the inquest rules caution that such evidence should be limited to what the involved officers
12 actually knew when they killed Mr. Butts. *See* Appx. 2 at 4.4 (directing that decedent’s criminal
13 history and activity should be limited to what the involved officers were actually aware of prior to
14 any use of force); Appx. 2 at 4.5 (directing that if criminal history is admitted it must be limited to
15 the greatest extent possible). While there was no adjudication of criminal liability regarding Mr.
16 Butts’ actions at the 7-Eleven, the inquest rules’ limit prejudicial evidence of past behaviors
17 unknown to the involved officers must be adhered to here. This requires the exclusion of live
18 testimony regarding the incident at 7-Eleven, the details of which the Involved Officers knew little.
19 Instead, the stipulated facts regarding the robbery can and should be solicited from the parties and
20 subsequently presented to the panel. This is consistent with the rules interest in efficiency, fairness,
21 and avoidance of prejudice or confusion. *See* Appx. 2 at 5.3 (“The administrator shall solicit
22 proposed stipulations of fact from the participating parties and work diligently to narrow the scope
23 of the inquiry at the inquest.”)

1 *Third*, evidence regarding SPD’s use of a flash bang and reliance on a K-9 dog to extract
2 Mr. Butts must be allowed because as officers on the scene noted: “[t]he plan [was . . .] to extract
3 the suspect from hiding if we could do so safely” by using the flash bang, the robot, and Blitz.
4 Butts 1626-27. This indicates that the Involved Officers believed that Mr. Butts was still alive after
5 the shooting, and how they treated him post-shooting is relevant to the inquest proceedings as the
6 steps taken by the Involved Officers that lead up to the shooting. This is especially true where it is
7 uncertain whether Mr. Butts was alive at the time of the extraction. *See* Butts 1858 (noting that the
8 dog bite wound was perimortem or postmortem).

9 **E. The Family Should Be Allowed to Use Garrity Statements During the Inquest**
10 **Hearing**

11 The *Garrity* Statements made by the Involved Officers must be admissible. Use of these
12 statements in the inquest proceedings does not raise constitutional concerns. Indeed, the United
13 States Supreme Court—in no uncertain terms—expressly held that *Garrity* “statements obtained
14 under threat of removal from office” are only “prohibit[ed from] use in subsequent criminal
15 proceedings[.]” *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S. Ct. 616, 620, 17 L. Ed. 2d 562
16 (1967). *See also Seattle Police Officers' Guild v. City of Seattle*, 80 Wash. 2d 307, 310, 494 P.2d
17 485, 487 (1972) (affirming that the *Garrity* decision confined its attention and holding to the single
18 proposition that statements obtained in the course of a disciplinary investigation under threat of
19 dismissal from office could not be used as evidence in subsequent criminal prosecutions).

20 The inquest is in no form a criminal proceeding wherein constitutional protections would
21 bar use of the *Garrity* statements obtained during the investigation of the law enforcement involved
22 death of Mr. Butts. One has to look no further than the stated purpose of the inquest to determine
23 that it is not a criminal proceeding: “an inquest shall be held to find facts and review the
24 circumstances of any death involving a member of the law enforcement agency[.]” PHL-7-1-2-

1 EO, *Conducting Inquests in King County* (Oct. 3, 2018). *See also* Appx. 1 at 2.3 (noting that “[t]he
2 purpose of the inquest is not to determine whether the law enforcement member acted in good faith
3 or should be disciplined or otherwise held accountable, or . . . to determine civil or criminal
4 liability”). Further, “[t]he inquest is an administrative hearing intended to be a fact-finding, non-
5 adversarial process.” Appx. 2 at 1.1.

6 As the inquest is a fact-finding process meant to ensure public accountability of law
7 enforcement actions, allowing the use of *Garrity* statements is consistent with the policy
8 undergirding *Garrity* statements themselves, including the fact that there is strong public policy in
9 favor of promoting honesty and integrity in law enforcement employees, the goal of this policy
10 being the encouragement of public trust in law enforcement. *Kitsap Cty. Deputy Sheriff's Guild v.*
11 *Kitsap Cty.*, 167 Wn.2d 428, 449–50, 219 P.3d 675, 685 (2009) (Johnson, C. concurring).

12 Not only does use of the *Garrity* statements not trigger any constitutional concerns, the
13 Family must have the ability to use those statements if they are needed for impeachment purposes.
14 *See* Evidence Rule 613(a) (allowing for the examination of a witness concerning a prior statement
15 made by the witness); ER 613(b) (allowing the use of extrinsic evidence of a prior inconsistent
16 statement). ER 806 (allowing use of prior inconsistent statements for impeachment purposes).

17 **F. Use of Force Experts Are Permitted and Necessary to Assist the Panel in Determining**
18 **Whether the Involved Officers Acted in Accordance with SPD Policies and Training**

19 The presentation of expert testimony in inquest proceedings is expressly contemplated and
20 approved by the inquest rules. *See* Appx. 2 at 12.1 (affirming that each party may proffer its own
21 witnesses to provide testimony that aids the panel). With such a clear endorsement of the
22 presentation of expert testimony, SPD’s argument—that the Family’s Use of Force expert must be
23 excluded—falls flat. Further, SPD’s argument runs afoul of longstanding precedent that allows use
24 of force expert testimony in matters assessing the appropriateness of law enforcement’s use of

1 deadly force. *See Tubar v. Clift*, No. C05-1154-JCC, 2009 WL 1325952, at *2 (W.D. Wash. May
2 12, 2009) (affirming that expert testimony from Van Blaricom was appropriate to assist the jury
3 in determining whether the involved officers acted according to their policies). *See, e.g., Smith v.*
4 *City of Hemet*, 394 F.3d 689, 703 (9th Cir. 2005) (en banc); *Davis v. Mason County*, 927 F.2d
5 1473, 1484-85 (9th Cir. 1991); *Larez v. City of Los Angeles*, 946 F.2d 630, 635, 647 (9th Cir.
6 1991). This is “[b]ecause Van Blaricom has specialized experience with police practices, his
7 testimony may help the jury interpret and understand the evidence.” *Id.* *See also Mukhtar v. Cal.*
8 *State Univ., Hayward*, 299 F.3d 1053, 1066 n. 7 (9th Cir. 2002) (“Encompassed in the
9 determination of whether expert testimony is relevant is whether it is helpful to the jury, which is
10 the ‘central concern’ of Rule 702.”); *United States v. Gwaltney*, 790 F.2d 1378, 1381 (9th
11 Cir.1986) (“The general test regarding the admissibility of expert testimony is whether the jury
12 can receive ‘appreciable help’ from such testimony.”).

13 Further, contrary to SPD’s argument, “testimony in the form of an opinion or inference
14 otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by
15 the trier of fact.” Rule of Evidence 704. “It is well-established ... that expert testimony concerning
16 an ultimate issue is not per se improper.” *Hangarter*, 373 F.3d at 1016 (*quoting Mukhtar*, 299 F.3d
17 at 1066 n. 10). Accordingly, expert testimony regarding the appropriateness of police conduct is
18 generally allowed. *See, e.g., City of Hemet*, 394 F.3d at 703 (holding that a rational jury could rely
19 upon expert testimony regarding the training of police dogs and their handlers to determine
20 whether the officers' use of force was unreasonable).

21 As SPD’s attempt to exclude the Family’s use of force expert runs against longstanding
22 precedent, the Inquest Administrator should reject SPD’s argument and allow the Family to present
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1 a use of force expert on matters that may assist the Panel in determining whether the Involved
2 Officers acted in accordance with SPD policies and training.

3 **CONCLUSION**

4 For the foregoing reasons the Family requests that you limit the scope of the inquest as
5 detailed above, allow a Use of Force expert, and admit *Garrity* statements.

6 DATED this 4th day of October, 2019

7
8 */s La Rond Baker*

9

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