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KING COUNTY DEPARTMENT OF EXECUTIVE
SERVICES INQUEST PROGRAM

INQUEST INTO THE DEATH OF:

No. 517IQ8013

DAMARIUS DEMONTA BUTTS,

INVOLVED OFFICERS’
RESPONSE TO THE FAMILY’S
MOTION TO COMPEL

Deceased.

I. INTRODUCTION

Invoking a mash of inquest rules, civil rules, oblique reference to enabling legislation and civil precedent, the family asks the Administrator to employ subpoena authority that does not exist, and to force an illogical and unfounded cage around involved officers’ participation and testimony rights. The family’s position is without basis.

RCW 36.24 *et seq.* – the enabling legislation for the inquest process – provides that a coroner may hold an inquest under particular circumstances. RCW 36.24.020. King County Code Chapter 2.35A.090 vests the coroner’s role, and hence that statutory authority to conduct inquests, in the King County executive. Pursuant to Appendix 1 of PHL-7-1-2-EO, the King County Executive has selected an Administrator(s) to preside over the inquest proceeding, acting

1 in the executive's stead under the assumption of coroner authority. Consequently, the
2 Administrator sits in the role of the coroner and RCW 36.24 *et seq.* and PHL-7-1-2-EO both
3 establish and limit his or her authority. Under that authority, the Administrator may only
4 subpoena witnesses to appear and testify at the inquest. The Administrator should deny the
5 Family's Motion to Compel as it is unsupported.

6 As it relates to argument surrounding pre-inquest interviews and Administrator subpoena
7 authority, the City of Seattle and the involved officers submit this brief jointly. The City of
8 Seattle does not join or take any position on arguments related to Involved Officer testimony.

9 II. ARGUMENT

10 A. The Administrator does not have authority to subpoena witness testimony or 11 interviews prior to the inquest hearing.

12 The Washington Supreme Court recently addressed the question of inquest subpoena
13 power in *BNSF Ry. Co. v. Clark*, 192 Wn.2d 832, 434 P.3d 50 (2019). In *BNSF*, a BNSF train
14 struck R.S. as it travelled through Puyallup, Washington. *Id.* at 835. The train was equipped with
15 a video camera that recorded the incident. *Id.* In investigating the death, Pierce County Medical
16 Examiner, Dr. Thomas Clark, contacted BNSF and requested a copy of the video. *Id.* BNSF
17 informed Dr. Clark it would make the video available for him to view, but would not produce a
18 copy of the video out of concerns about it being leaked. *Id.*

19 Thereafter Dr. Clark sent a memorandum to the Pierce County Superior Court
20 administrator advising he was opening an inquest pursuant to RCW 36.24.020. *Id.* at 835-36.
21 However, he indicated he was not requesting the Superior Court provide a jury for the inquest or
22 schedule courtroom related services until a later time. *Id.* Dr. Clark then issued an inquest
23 subpoena to BNSF demanding the production of the video. *Id.* at 836. The subpoena contained a
cause number but BNSF could not find the case on the Pierce County Superior Court website and

1 refused to comply with the subpoena. *Id.* BNSF then sought a writ of mandamus commanding
2 Dr. Clark to withdraw the subpoena and a writ of prohibition preventing him from enforcing the
3 subpoena. *Id.* The Pierce County Superior Court denied the writ of mandamus but entered a writ
4 of prohibition requiring Dr. Clark to withdraw or not enforce the subpoena. *Id.* Dr. Clark
5 petitioned for direct review to the Washington Supreme Court. *Id.*

6 The Supreme Court conducted a thorough analysis of the foundational authority for
7 inquests and a coroner’s subpoena power; it held that (1) a coroner’s subpoena power is tied
8 exclusively to inquests and (2) a coroner can only subpoena witnesses and evidence to appear at
9 the actual inquest proceeding. *Id.* at 836-847. Specifically, the *BNSF* Court found that before a
10 coroner may exercise subpoena power, he or she must first properly initiate the inquest process
11 by requesting persons to serve as a jury of inquest.¹ *Id.* at 837. After initiating the inquest, a
12 coroner may then issue subpoenas, but only to appear before the inquest jury:

13 [O]nce the coroner has properly begun the inquest process by requesting jurors, he or she
14 is authorized to issue subpoenas ***returnable to the inquest jury***. The coroner “conduct[s]”
15 the inquest, RCW 36.24.020, and “examine[s]” the witnesses, RCW 36.24.050. The
16 coroner must be allowed to issue subpoenas before the jury is actually empaneled to
17 ensure that the coroner will have witnesses to examine once the jury is empaneled to hear
18 the evidence.

19 *Id.* at 841 (emphasis added).

20 The family may contend that the legislature responded to *BNSF* by enacting RCW
21 36.24.200. However, that statute only applies to the production of documents, and does not apply
22 to inquest witness testimony. Indeed, as evidenced by House and Senate Reports, the bill was
23 enacted in part to avoid a coroner having to call an inquest:

¹ Here, this particular step was met when King County Executive Dow Constantine wrote Judge Rogers on May 20, 2019, requesting a courtroom for the inquest and persons to serve as a jury. *Declaration of Evan Bariault* (“*Bariault Decl.*”), Ex. 1.

1 This [bill] will help coroners and medical examiners get more accurate information
2 during a death investigation. This provision could avoid the need for inquests in some
3 circumstances.

4 ...
5 A subpoena issued by the court to obtain records will be helpful to obtain records that
6 may assist in the determination with respect to mental processes and time of death. These
7 records might include medical records, bank records, mental health records, and rental
8 contracts.

9 *Bariault Decl.*, Ex. 2. Nowhere in the legislative history, however, is there any indication or
10 suggestion that the legislature intended to broaden inquest subpoena authority related to
11 testimony. To the contrary, the legislative history is very clear that the statute is limited to the
12 production of documents – “additional subpoena duces tecum authority”:

13 **Title:** An act relating to providing coroners with additional subpoena duces tecum authority.

14 **Brief Description:** Providing coroners with additional subpoena duces tecum authority.

15 **Brief Summary of Bill**

- 16 • Authorizes a coroner to request the superior court to issue a subpoena to
17 produce records during a death investigation.
- 18 • Requires subpoenas to comply with superior court Civil Rule 45.
- 19 • Authorizes contempt of court for failure to obey a subpoena without an
20 adequate excuse.

21 *Id.* The last sentence in RCW 36.24.200 that a subpoena for records may be “joined with a
22 subpoena for testimony” does not authorize the Administrator to subpoena witnesses for pre-
23 inquest testimony as clearly evidenced by *BNSF* and House and Senate Reports related to RCW
36.24.200.

The enabling legislation restricts the use of inquest witness subpoenas to testimony
before the inquest panel. The Administrator cannot issue subpoenas for witness interviews or
testimony prior to the inquest and should reject the family’s request.

1 **B. Civil discovery rules do not apply to inquests.**

2 The family’s reliance on civil rules founders on a simple fact – an inquest is not a lawsuit.
3 The inquest is “an administrative, fact-finding inquiry into and review of the manner, facts and
4 circumstances of the death of an individual involving a member of any law enforcement agency
5 within King County while in the performance of his or her duties[.]”² Neither RCW 36.24 *et seq.*
6 nor PHL-7-1-2-EO contemplate use of or the application of civil rules to inquests.³ Indeed,
7 Appendix 2 to PHL-7-1-2-EO specifically limits discovery to a particular set of information:

8 4.2. Discovery materials are to be used by the attorneys solely for the inquest proceeding.
9 Such materials include the police and/or agency investigative file of the incident that
10 resulted in the death. They also include the report of the medical examiner, crime
 laboratory reports, and the names, addresses, and summaries and/or copies of statements
 of any witnesses obtained by any party.

11 The civil rules apply only to civil lawsuits, and those rules provide for much broader discovery
12 and subpoena authority than allowed under the inquest legislation or the executive order. The
13 limitations on subpoena authority under the enabling legislation, as identified by the Supreme
14 Court, are antithetical to the broad authority in the civil rules. The Family’s reliance on CR 26
15 and cases addressing the purpose of civil discovery is misplaced.

16 **C. Subpoenas are not necessary for the family to meaningfully participate.**

17 The family’s claim that they do not have sufficient information to fully participate in the
18 inquest is also not well taken.

19 First, contrary to the family’s assertion, SPD and the Involved Officers possess the same
20 information and details regarding what occurred during and up to the shooting. Specifically, all
21 parties have copies of officer interviews, witness statements, the Force Investigation Team
22 report, and the medical examiner’s file.

23 ² ¶ 5.3, Appendix 1, PHL-7-1-2-EO.

³ Presumptively the executive intentionally rejected including the civil rules, in that the order provides for
 the use of the Rules of Evidence, but is silent as to the civil rules.

1 Second, the officer and witness interviews provide detailed statements about the facts and
 2 circumstances of Mr. Butts' death, as does the Force Investigation Team report. In particular, the
 3 FIT interviews of law enforcement officers at the incident are exceptionally detailed. The
 4 family's contention that it is the only party without pre-inquest hearing access to information
 5 ignores the significant and detailed information currently in its possession.

6 Last, those law enforcement personnel that were not previously interviewed are being
 7 made available for interviews. Assistant Chief Cordner and Captain Teeter are scheduled to sit
 8 for interviews.

9 Accordingly, all of the officers and witnesses identified in the Administrator's most
 10 recent pre-inquest order engaged in interviews, provided audio statements or submitted written
 11 statements, all of which is equally available to all parties:

Witness	Available Information
Daniel Yohannes	Provided audio statement (See transcript of recording at Butts_I 1892-1902)
SPD Officer Christopher Bandel	Provided FIT Interview (Butts_I 1651-1673)
SPD Officer Hudson Kang	Provided FIT Interview (Butts_I 1634-1646)
Justin Keaton	Provided audio statement (See transcript of recording at Inquest_I 2408-2433)
SPD Officer Brian Pritchard	Provided FIT Interview (Inquest_I 2547-2560)
SPD Officer Jacob Briskey	Provided written statement (Butts_I 1581-1582)
KC Sheriff Deputy Anthony Mullinax	Provided written statement (See Inquest_I 2608)
Detective David Simmons	Force Investigation Reports (See Butts_I 0496-0609)
Detective Donald Ledbetter	CSI Report (See Butts_I 0436-0471)
SPD Asst. Chief Lesley Cordner	Scheduled to be interviewed by the Family
SPD Department Captain Michael Teeter	Scheduled to be interviewed by the Family
Douglas Houck	Provided audio statement (See transcript of recording at Butts_I 1998-2009; 2022-2027)
Jason Benson	Provided audio statement (See transcript of recording at Butts_I 1911-1915)
Brad Richardson	Provided audio statement (See transcript of recording at Butts_I 2131-2135)
Tom Townsend	Provided audio statement (See transcript of recording at Butts_I 2301-2306)
Melissa Miller	Provided audio statement (See transcript of

Further, numerous other witness interviews, statements and related documents detail the events. There is simply no support to the family's claim that it cannot adequately participate or prepare without interviews.

D. Nothing in the inquest rules require the involved officers to declare they will testify prior to the inquest.

The family demonstrates no prejudice that will result from the involved officers waiting until the inquest hearing to determine if each will testify. As with the other officers at the scene, the family has ample information to prepare to examine the involved officers should they elect to testify. Indeed, each of the involved officers provided their recitation of events in lengthy interviews conducted by the Force Investigation Team with multiple questions and follow up questions examining the force application circumstances and decision-making process in remarkable detail. The family possesses those interviews, just as the inquest attorney and other parties; the family has no basis to assert that they do not know what the officers said happened.

While the family demonstrates no prejudice, the involved officers may suffer considerable prejudice if they are forced to make a decision about testifying before the inquest. The family is simply incorrect that the inquest proceeding does not possess potential criminal implications. Indeed, our Washington Supreme Court recently acknowledged the potential for criminal liability stemming from inquest proceedings:

A coroner's inquest is a proceeding in which a jury, instead of the coroner, determines the cause of death of an individual. "[T]he purpose of a coroner's inquest is to determine who died, what was the cause of death, and what were the circumstances surrounding the death, including the identification of any actors who may be criminally liable for the death."

1 BNSF, 192 Wn.2d at 837-38 (quoting *Carrick v. Locke*, 125 Wn.2d 129, 133, 882 P.2d 173
2 (1994)). The involved officers' concerns regarding potential criminal implications is further
3 supported by Appendix 1 to PHL-7-1-2-EO, which states:

4 2.3. The purpose of the inquest is not to determine whether the law enforcement
5 member acted in good faith or should be disciplined or otherwise held accountable,
6 or to otherwise find fault, or to determine if the use of force was justified, or to
7 determine civil or criminal liability. ***It is acknowledged that the facts determined in
8 the course of the inquest may sometimes have an indirect bearing on such
9 determinations.***

10 (emphasis added). Ultimately, there is little question that an involved officer's participation
11 could significantly enhance the fact-finding purpose behind the inquest. Providing an officer the
12 flexibility to change his or her mind and provide information to the jury would enhance the
13 executive's purpose in reformulating the inquest rules. Arbitrary limitations on such potential
14 testimony, on the other hand, would provide the exact opposite effect.

15 The family can prepare to examine the involved officers should they choose to testify just
16 as they can any other witness – indeed, just as attorneys have in all manner of proceedings for
17 centuries. The involved officers are known potential witnesses and permitting them to decide
18 whether each will testify at the time of the inquest will not hinder the family's ability to
19 participate or prepare.

20 **E. This Administrator has already ruled that counsel for the involved officers may
21 participate in the inquest even if they elect not to testify.**

22 This Administrator has already rejected the family's argument regarding participation and
23 ruled that involved officers may participate without providing testimony:

24 **5. Motion to Clarify Parties – Officer Participation:** In the course of arriving at the
25 final Order regarding the conducting of inquests in King County, the Executive omitted
26 suggested language that appeared to connect providing testimony and submitting to
27 examination by other parties to an involved police officer's decision to participate in the
28 inquest proceeding. Even if, as suggested by the Family, the omission was an oversight,
29 the Administrator is nonetheless bound by the Order's explicit language. ***Accordingly,***

1 *the officers involved in the death of Charleena Lyles may continue to participate in this*
2 *proceeding without a commitment to provide testimony or submit to examination.*

3 *Bariault Decl.*, Ex. 3 (Pre-Inquest Conference Order - Inquest into the Death of Charleena Lyles
4 (Inquest #517IQ9301)) (emphasis added). While the Administrator is aware of the procedural
5 history associated with the development of the executive's order that founded the decision on the
6 identical issue in the Lyles Inquest, in the interest of efficiency, the involved officers provide the
7 relevant Lyles briefing to supplement this response. *Bariault Decl.*, Ex. 4. Consistent with this
8 Order, the involved officers and their counsel may participate in the inquest regardless of
9 whether they elect to testify.

10 **III. CONCLUSION**

11 The family possesses thousands of documents, images, and videos detailing the actions of
12 officers, witnesses and Damarius Butts in relation to his death – the same information possessed
13 by the other parties. Further, the family possesses the 114 page Force Investigation Report, the
14 Crime Scene Investigation Report, and the Medical Examiner's Report. Its claim that it cannot
15 adequately prepare for the inquest and meaningfully participate is simply unfounded. Further, it
16 fails to cite any precedent that requires the involved officers to decide whether to testify prior to
17 the inquest, and establishes no prejudice that would support such a requirement. We respectfully
18 request the Administrator deny the Family's Motion to Compel.

19 DATED this 25th day of October, 2019, at Seattle, Washington.

20 **FREY BUCK, P.S.**

21 By: /s/ Evan Bariault
22 Ted Buck, WSBA #22029
23 Evan Bariault, WSBA #42867
Attorney for Seattle Police Department Involved
Officers

