King County Superior Court
Seattle Division

IN RE INQUEST INTO THE DEATH OF CHARLEENA CHAVON LYLES,	)	No. 517IQ9301 CITY OF SEATTLE AND SEATTLE POLICE OFFICERS' RESPONSE TO MOTION TO CLARIFY PARTIES

I. INTRODUCTION AND RELIEF REQUESTED

The family has sought to exclude legal representatives for the Seattle Police Officers and the Seattle Police Department ("SPD") from engaging in the inquest process on a claim that their clients are not proper parties. As outlined below, the two SPD officers, via Mr. Buck and Ms. Cobb, and the SPD, via its legal advisor, Ms. Boatright, have a right to representation in the proceedings and the Administrator should deny the family's motion to exclude them.

The very nature of an inquest invokes the constitutional rights of the involved officers. A prosecutor may use the factual findings from such proceedings to support the filing of criminal charges against an officer. For that reason—whether or not an officer has any concerns that his or her conduct could be deemed criminal—officers cannot be compelled to testify in an inquest. Along with an admitted pecuniary interest in the civil case, Ms. Lyles' family members and their counsel

have publicly been very outspoken that arrest and conviction of the officers is their goal, regardless of the absence of any legal basis. With such serious constitutional rights in jeopardy, the family nonetheless argues that unless the officers agree to waive their constitutional rights and take the stand, they are barred from engaging their own counsel in the inquest process. Instead, they hope to control the flow and presentation of evidence in a manner skewed toward their own agendas. The City cannot represent the interests of the officers. The officers are entitled to independent counsel of their choosing to ensure the proper end to the inquest – assuring that all relevant facts within the scope of the proceeding are presented to the jury in a full and fair manner.

The family's skewed interpretation of the intent of the new inquest processes is constitutionally defective, contrary to the stated goals of the inquest process and illogical from a traditional "participation" analysis. The motion must be denied.

II. AUTHORITY AND ARGUMENT

A. Officers McNew and Anderson have a constitutional right to representation.

The family of Ms. Lyles asserts that law enforcement officers that choose not to testify in conformity with their constitutional rights are not "participating" and are not entitled to representation of counsel during the pre-inquest and inquest proceedings. It is a staggering and dystopian suggestion – that to participate in a public proceeding a party necessarily must forfeit constitutional rights. One can only imagine the family's counsel's response should it be suggested that a party with equivalent rights, a criminal defendant, not be allowed to "participate" with counsel in her trial unless she agreed to waive her constitutional rights. The goal of an inquest is a full, fair, and non-biased panel evaluation of the facts and circumstances, a process our system of justice has *forever* recognized requires advocacy on *both sides of the issue* to render a faithful finding.

Disposing of a party for retaining constitutional rights cannot in any possible sense advance that seminal American justice ideal.

The purpose of an inquest is to determine the identity of the deceased, the cause of death, and the circumstances of the death, including an identification of any actors who may be criminally liable. RCW 36.24.040; Carrick v. Locke, 125 Wash.2d 129, 133, 882 P.2d 173 (1994), citing State v. Ogle, 78 Wash.2d 86, 88, 469 P.2d 918 (1970). This potential for criminal charges makes the right to invoke constitutional protections and the right to representation sacrosanct.

Washington courts have recognized the fundamentally different position officers occupy in an inquest due to their unique risk of prosecution. In Miranda v. Sims, 98 Wn. App. 898, 908–09, 991 P.2d 681, 687 (2000), for example, the court confirmed that law enforcement officers have a fundamentally different interest in "participating" by way of representative counsel in inquest proceedings because they have the potential be held civilly or criminally liable: "Here, the family's participation and interest in the proceeding is fundamentally different from that of the [officers]. The [officers] involved in the inquest may have had important knowledge of [decedent's] death and may be civilly or criminally liable." Miranda cited to seminal federal precedent acknowledging the unique situation officers occupy. Id., *citing* Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 1489 (1967) & Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489 (1964).

This line of U.S. Supreme Court cases impresses the privileges of the Fifth Amendment upon state proceedings through the due process clause of the Fourteenth Amendment. Sims, supra. It is highly unlikely the King County Executive intended to coerce testimony of a law enforcement officer by barring the officer from being represented by counsel unless the officer agrees to waive his or her Fifth Amendment rights. More reasonably, the provision regarding participation simply makes it solely the officers' option to be present and/or to have counsel present, even if they decide

not to testify. The family calls it "cherry-picking"; our jurisprudence calls it a right guaranteed under the United States Constitution. Public employees, like all other persons, are entitled to the benefit of the Constitution, including the privilege against self-incrimination. Seattle Police Officers' Guild v. City of Seattle, 80 Wn.2d 307, 309–15, 494 P.2d 485, 487–90 (1972).

Likewise, the family seems to suggest that if an officer chooses to be present and participate so that he or she can also have an attorney, the inquest rule that entitles parties to "offer witness testimony" can be used to compel officer testimony when the court cannot—a ludicrous suggestion.[1] The availability of the Fifth Amendment privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure or penalty which it invites. State v. Post, 118 Wn.2d 596, 604–05, 826 P.2d 172, 177 (1992), amended, 118 Wn.2d 596, 837 P.2d 599 (1992), citing In re Gault, 387 U.S. 1, 49, 87 S.Ct. 1428, 1455 (1967).

Finally, the family suggests that their cockeyed interpretation of the rules is supported by State v. Keller, 143 Wn.2d 267 (2001), which requires that "statutes must be construed so that all language is given effect with no portion rendered meaningless or superfluous." Here the executive order merely notes that an officer's participation is voluntary, and that if she opts to participate she may be represented. Nothing in the order or rules provides that she must agree to sacrifice constitutional protections – indeed, the order specifically recognizes those protections. Should the executive have intended such a draconian course, he would have done so in plain language given the obvious consequences. Utilizing an individual's interest in a full and fair proceeding as leverage to force that individual to abandon his constitutional would be unprecedented. The executive and his

[1] The family admits that officers cannot be compelled, but still states that an officer must appear and testify if the officer chooses to "participate" by having counsel present.

advisory team are not fools, they recognized the officers' rights, and included no language to support the staggering abuse of those rights now advocated by the family.

Moreover, any administrative or legislative act that runs afoul of constitutional rights is necessarily defunct. The family simply ignores that fundamental tenet of our justice system.

Contrary to the family's interpretation of the new rules, the Constitution demands that officers are entitled to "participate" by having counsel represent their interests even if they do not intend to testify or even appear. The "penalty" exception to the general rule that the Fifth Amendment is not self-executing excuses a privilege holder's failure to assert the privilege in situations where the State threatens to sanction the exercise of the privilege. Post, supra, at 609. The penalty could be economic loss or deprivation of liberty. Id., at 610, citing Minnesota v. Murphy, 465 U.S. 420, 434-435, 104 S.Ct. 1136 (1984). The analysis would focus on whether a particular disclosure that is later used in a criminal prosecution is (1) incriminating and (2) coerced by the threat of a penalty. Post, supra, at 610-611.

Although there are no criminal proceedings pending or anticipated against the officers, there has also been no grant of immunity or guarantee that there will not be such charges considered in the future; indeed, inquests include that prospect by statute. In this case, the family and their counsel have publicly expressed that arrest and prosecution of [these] officers is their ultimate goal; the threat is made even more realistic in light of the passage of I-940 (which makes it easier to charge officers' who use lethal force). See Post, supra (The court found that Post did not face a realistic threat of incrimination when he made the statements because all questions were related to conduct for which Post had already pleaded guilty or been convicted, so his answers did not expose him to new or additional liability.)

Finally, a simple exercise in practical possibilities evidences the dramatic consequence that could follow should the family's convoluted theory be followed. There is a distinct prospect that a family member could be an important witness for the inquest process, as a participant or observer of the underlying event.[2] That family member may well assert her Fifth Amendment privilege at the inquest. By the family's reasoning, the family would then be prohibited from participating in the proceeding with counsel. To argue otherwise would patently place the family in a superior position to the involved officers, raising the obvious specter of a different constitutional violation – equal protection. Nothing in the executive's order or the procedures suggests that any party is to be treated differently than any other. The family's request is unfounded, dangerous and unconstitutional.

B. **Rebecca Boatright is the client representative for the Seattle Police Department and has a statutory right and obligation to be involved in the Inquest process.**

The Family's request to exclude SPD's legal representative from the inquest process is confounding. It is the City's understanding that the Seattle Police Department is required to participate and be involved in the inquest process. This requires much logistical planning and scheduling, as well as understanding records/processes for the purposes of facilitating discovery. Ms. Boatright is the Executive Director of Legal Affairs for the Seattle Police Department, and therefore entitled to be involved in the logistics of scheduling and planning for the purposes of inquests. Ms. Boatright does not intend to examine witnesses or write briefs. In fact, she has not. Arbitrarily – and without any legal justification – seeking to exclude her from being included on scheduling e-mails and from hearings is absurd. Granting this request would serve only to complicate matters and further delay the facilitation of the inquest process. The Administrator should deny this request.

[2] Indeed, the sister of Damarius Butts, whose death is the subject of a parallel inquest, potentially fits this mold. It is not an uncommon event.

III. CONCLUSION

Ms. Boatright has a right to participate as SPD's legal representative as a matter of practicality and in keeping with inquest rules. Officer McNew and Officer Anderson are entitled to representation at and leading up to the inquest, whether or not they intend to appear or testify in keeping with the letter and spirit of the inquest rules and in recognitions of their constitutional rights. There is no basis to argue the executive intended to use participation as a lever to force involved officers to forfeit their rights.

Dated this 6th day of September, 2019.

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IN RE INQUEST INTO THE DEATH OF CHARLEENA CHAVON LYLES,	)	No. 517IQ9301 SEATTLE POLICE OFFICERS' SUPPLEMENTAL RESPONSE TO MOTION TO CLARIFY PARTIES

After submitting their response to the family's Motion to Clarify Parties, counsel for the involved officers were alerted to public disclosure request responses from King County that provided information related to the development of the inquest order and appendices at issue in this motion. Review of the disclosed information provides significant insight into the executive's intent with regard to the role of involved officers as participating parties. This information is essential to the Administrator's decision.

The drafting history of the Executive Order establishes that an officer need not testify as a pre-condition to participating through counsel. The original draft of the Executive Order, like the final version, defined the "Participating Parties" without any verbiage requiring testimony as a prerequisite to participation for law enforcement officers. As shown below, language requiring testimony in order to "participate" was suggested and added to later drafts of the appendices;

"...provided that the law enforcement member(s) elects(s) to participate in the inquest proceeding **and offer testimony** subject to examination by the other participating parties". (Emphasis added) The final version, however, eliminated the requirement that the officers testify in order to participate. It now states merely "…provided that the law-enforcement member(s) **elect(s) to participate** in the inquest proceeding." (Emphasis added). Clearly, the claimed requirement to testify was considered and rejected by the executive. The significance of this drafting history is amplified by the fact that the origin of the rejected proposal to require testimony as a prerequisite to participation was the family's attorney, Mr. Guilmette. While he plainly knew this history, and despite a compelling opportunity on this motion, he failed to reveal this significant fact to the Administrator.

On July 16, 2018, Mr. Guilmette, then under the auspices of representing a "community coalition," emailed proposed changes to a draft of the inquest executive order and appendices, which he described as a "community–law enforcement inquest agreement" and "formatted against the backdrop of the inquest review committee's proposal…." Declaration of Ted Buck Regarding Motion to Clarify Parties ("Buck Decl."), Exhibit 1, p. 1. Mr. Guilmette sent his revised draft to, among others, Gail Stone, Calli Knight and other King County personnel involved in the development of the new inquest procedures. In the preamble to Mr. Guilmette's revised draft, he specifically notes that, "the proposed resolution addresses the six areas identified by law enforcement at the June 20th meeting where immediate agreement could not be reached." *Id.* A footnote to the document provides, among others, the following law enforcement concerns:

> . . .
>
> 5. Insuring involved law enforcement officers have the same legal rights as other parties; and

> 6. Allowing counsel for law enforcement officers to participate in the inquest even if the officers declined to participate (**this was the only outstanding area of concern where the community coalition could not support the position of law enforcement**).

Buck Decl., Ex. 1, p. 1. (Emphasis added).[1]

In Mr. Guilmette's proposed version of the inquest appendices, under "PARTICIPATING PARTIES," he added language that would have required officer testimony and cross examination as a prerequisite to participating with attorney representation:

> b. The law enforcement member(s), if known, who shall be allowed to have an attorney(s) present, provided that the law enforcement member(s) elect(s) to participate in the inquest proceeding and offer testimony subject to the examination by the other participating parties.

Id., p. 7 (underline in original as tracked change).

On July 17, 2018, King County's Calli Knight sent an email to fellow executive staffers Gail Stone (who coordinated the executive's inquest review process) and Gina Topp with comments to the Guilmette inquest procedure proposal. *Buck Decl., Ex. 2*. Ms. Knight attached a comment to the aforementioned definition of participating law-enforcement members, plainly indicating that the executive's office was contemplating how to treat officers in the process. At that juncture, the executive's office retained the proposed obligation that officers agree to testify as a prerequisite to participation: "…provided that the law enforcement member(s) elect(s) to participate in the inquest proceeding **and offer testimony subject to examination by the other participating parties.**" *Id.,* p. 7 (emphasis added).

[1] It is revealing that one of the concerns raised by law enforcement that Mr. Guilmette's "community coalition" could not agree with was that officers be treated the same as other parties. Obviously fundamental fairness is not a concern to the group.

On October 1, 2018, another draft of the proposed inquest procedures was circulated. *Buck Decl., Ex. 3*. In that version, the executive's office retained the earlier proposed language with its mandate of testimony to "participate":

> 2.2 The law enforcement member(s), if known, who shall be allowed to have an attorney(s) present, **provided that the law enforcement member(s) elect(s) to participate in the inquest proceeding and offer testimony subject to examination by the other participating parties.**

Id., p. 8 (emphasis added).

In the next iteration of the draft inquest procedures developed by the executive's staff, however (Oct. 2, 2018), the executive dropped the requirement of officer testimony and cross-examination as a condition of participation. *Buck Decl., Ex. 4*. The executive's new definition provided as follows:

> 2.2 The law enforcement member(s) involved in the death, shall be allowed to have attorney(s) present, **provided that the law-enforcement member(s) elect(s) to participate in the inquest proceeding.**

Id., p. 6. (Emphasis added).

The final inquest order and appendices adopted by Executive Constantine just one day later, on October 3, 2018, made minor revisions to the definition, but retained the revised definition of participating law enforcement officers, rejecting the requirement that officers testify and be cross-examined in order to participate in the process. The final order provides the following definition:

> 2.2 The law enforcement member(s) involved in the death, who shall be allowed to have an attorney(s) present, provided that the law enforcement member(s) elect(s) to participate in the inquest proceeding.

Buck Decl., Ex. 5, p. 7.

It is well established that where a governmental decision maker considers, then rejects, specific language in legislation or other acts, that rejection signals that the decision maker

purposefully chose to not authorize the rejected provision; the affected governmental entity is not then authorized to take up that which the decision maker has rejected. *See, e.g., Washington State Human Rights Commission ex rel. Spangenberg v. Cheney School Dist. No. 30*, 97 Wash.2d 118, 123, 641 P.2d 163 (1982) ("The rejection of this bill by the legislature implies that the legislature did not want the subject tribunal to have the power to award damages for humiliation and mental suffering for age discrimination violations. As the legislature rejected this request for expanded powers, municipalities or the Commission itself cannot change this rejection to approval by means of municipal ordinances and the Washington Administrative Code."); *see also State v. Schwab*, 103 Wash.2d 542, 551–52, 693 P.2d 108 (1985) (legislative history that the senate considered, then rejected, an amendment to add residential landlord-tenant act to list of Consumer Protection Act application evidences that the Senate "was well aware of the effect of what it was doing when it turned down the amendment extending the Consumer Protection Act").

Here the executive specifically contemplated requiring testimony and cross-examination as a prerequisite to officer participation in the inquest process; he subsequently rejected that requirement. In this "quasi-judicial" proceeding, where the Administrator is acting in the guise of the executive (who retains the statutory authority of the coroner in the wake of the advent of the medical examiner system), the Administrator must hew to the executive's rejection of that prerequisite to participation.

Accordingly, in addition to the constitutional and common sense bases previously raised for rejecting the family's motion to exclude the officers, this historical perspective makes it clear that the applicable authority – the executive – rejected that requirement and that the family's counsel was well aware of that decision. The Administrator must find that involved officers are

entitled to have representation before and during an inquest, regardless of whether they choose to testify.

Dated this 6th day of September, 2019.

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