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

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

NO. 517IQ8013

12 THE FAMILY'S REPLY IN SUPPORT OF
13 ITS MOTION TO COMPEL
14

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16 **I. INTRODUCTION**

17 The Seattle Police Department and the Involved Officers seek to limit the Family's ability
18 to adequately prepare for and participate in the inquest hearing by refusing to allow pre-inquest
19 hearing interviews of officers who witnessed the shooting of Damarius Butts and the officers who
20 shot him. *See* Baker Decl. Ex. A-B. SPD's and the Involved Officer's blanket opposition
21 undermines the purpose of the inquest process—transparency in reviewing law enforcement
22 involved deaths—and will likely result in an inefficient use of juror and Administrator time during
23 the inquest hearing itself. For these reasons, the Administrator should reject SPD's and the
24 Involved Officer's attempt to avoid providing pre-inquest testimony.

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II. ARGUMENT

A. The Administrator Has Authority to Subpoena Witness Testimony

As SPD and the Involved Officers acknowledge, “the Administrator sits in the role of the coroner and RCW 36.24 *et seq.* and PHL-7-1-2-EO (Inquest Executive Order) both establish and limits his or her authority.” Response to Mot. to Compel at 2. And under both RCW 36.24 *et seq.* and the Inquest Executive Order, the Administrator has authority to issue subpoenas for pre-inquest hearing testimony.

1. State Law Provides the Administrator Subpoena Authority

The Washington State Legislature recently passed RCW 36.24.200, which modified coroner’s authority to obtain information necessary to fully investigate a death. RCW 36.24.200 now expressly provides coroners the authority to issue subpoenas prior to an inquest hearing at any point in time “in the course of an active or ongoing death investigation[.]” RCW 36.24.200 also explicitly grants coroners authority to issue subpoenas for documents *and* for testimony. Indeed, RCW 36.24.200 states that during the course of an investigation coroners have the authority to issue subpoena duces tecums either in tandem with subpoenas for testimony or coroners may issue such subpoenas independently. *See* RCW 36.24.200.

When construing the meaning and purpose of a statute, Washington courts first look at the plain language of the statute. *HomeStreet, Inc. v. State, Dept. of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009). “Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself.” *Id.* (citing *Wash. State Human Rights Comm’n v. Cheney Sch. Dist. No. 30*, 97 Wn.2d 118, 121, 641 P.2d 163 (1982)). Absent ambiguity or a statutory definition, we give the words in a statute their common and ordinary meaning. *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). “Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself[.]” *AgriLink Foods, Inc. v. Dep’t of Revenue*, 153 Wn.2d

1 392, 396, 103 P.3d 1226 (2005). “A statute that is clear on its face is not subject to judicial
2 construction.” *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001).

3 Here, it is certain that RCW 36.24.200 allows coroners to issue subpoenas for documents
4 and testimony at any point after an inquest is called. The plain language of RCW 36.24.200 on its
5 face grants and affirms the power to subpoena testimony during a death investigation: “[a]
6 subpoena for production *may be* joined with a *subpoena for testimony*, or it may be issued
7 separately.” *See* RCW 36.24.200 (emphasis added). And although SPD and the Involved Officers
8 argue that the statute “does not apply to inquest witness testimony” and that it “does not authorize
9 the Administrator to subpoena witnesses for pre-inquest testimony[,]” they cannot rewrite the
10 statute. *Resp. to Mot. to Compel* at 3. Such authority is left to the Legislature, which expressly
11 affirmed that the Administrator, acting as a coroner, has authority to subpoena pre-inquest
12 testimony.

13 It should be noted that SPD’s and the Involved Officers’ argument that the legislative
14 history does not support the plain language of the statute is undermined by the Final Bill Report
15 for SB 5300. *See* Baker Decl. Exhibit C. In the summary, the Legislature discusses subpoenas for
16 testimony. *Id.* (noting that a “witness subpoena requires a person to appear and give sworn
17 testimony at a particular place and time”). Not only does RCW 36.24.200 on its face grant the
18 Administrator authority to subpoena pre-inquest hearing testimony, the legislative history affirms
19 that this was an intentional decision. SPD’s and the Involved Officers’ bald, unsupported assertion
20 that “[t]he enabling legislation restricts the use of inquest witness subpoenas to testimony before
21 the inquest panel” does not stand up to scrutiny in the face of RCW 36.24.200.

22 Further, RCW 36.24.200 was enacted after *BNSF Ry. Co. v. Clark* SPD’s and the Involved
23 Officers’ reliance on *BNSF* to undercut the Administrator’s authority fails. 192 Wn.2d 832, 840,
24 434 P.3d 50, 54 (2019) (affirming that coroners’ subpoena power arises once a request for a jury
is made which is when inquests are initiated).

1 **2. The Inquest Rules Provide the Administrator Subpoena Authority**

2 The Inquest Rules provide the Administrator subpoena authority that is not limited to the
3 inquest hearing. The subpoena authority embedded in the rules is triggered whenever the
4 Administrator deems that the issuance of a subpoena for witnesses or records is necessary. *See*
5 Appx. 1 at 7.1. Once that determination is made, the pro-tem attorney and the King County
6 Prosecuting Attorney have no discretion to deny, reject or ignore the request that a subpoena issue.
7 *Id.* Instead, the Inquest Rules require the pro-tem attorney and the Prosecuting Attorney to “issue
8 subpoenas to witnesses and/or for records at the administrator’s request.” *Id.*

9 The Inquest Rules also require SPD to “designate an official(s) to provide a comprehensive
10 overview of the forensic investigation into the incident[.]” Appx. 2 at 12.3. Thus far, SPD has not
11 designated an official to fill this role and the SPD officer who performed the crime scene
12 investigation has refused to voluntarily provide pre-inquest hearing testimony. *See Baker Decl.*
13 Exhibit B.

14 Under the Inquest Rules, it is clear that the Administrator has authority to issue subpoenas
15 for pre-inquest testimony. Presumably, SPD and the Involved Officers agree as neither addressed
16 the clear subpoena authority vested in the Administrator by the Inquest Rules. The Administrator
17 should use its authority to require SPD to provide pre-inquest hearing testimony regarding the
18 forensic investigation that occurred at the scene of Mr. Butts death.

19 **B. SPD’s Failure to Respond to the Motion to Compel Is Concerning**

20 Every non-shooting SPD officer has declined to be “voluntarily” interviewed. *See Exhibit*
21 *B.* Thus far, SPD has not taken any steps to require its officers to provide pre-inquest hearing
22 testimony even though it has the authority to do so. Under SPD policy 5.001(15), an SPD superior
23 officer can order the non-shooting officers to sit for pre-inquest interviews just as each was
24 required to provide statement immediately after the shooting of Mr. Butts. However, SPD has
elected not to do so and instead allowed its officers the individual discretion to refuse to provide
the Family an opportunity to explore the facts leading up to the death of Mr. Butts prior to the

1 inquest hearing. SPD should not be allowed to stonewall the Family’s preparation for the inquest
 2 hearing by allowing individual officers to refuse to provide information about the killing of a
 3 young man by on-duty SPD officers. SPD must show that it is committed to a fair and transparent
 4 review of its officers’ killing of a community member. SPD can do so by ordering its officers to
 5 provide pre-inquest hearing testimony regarding the events that lead to the death of Mr. Butts. Its
 6 failure to do so is deeply concerning, particularly in light of the consent decree that the City of
 7 Seattle entered into with the Department of Justice arising out of SPD’s excessive use of force—
 including a number of questionable police shootings.

8 **C. Pre-Inquest Interviews Are Necessary for the Family to Fully Participate in the**
 9 **Inquest Hearing**

10 In order to fully prepare for the inquest hearing the Family must be allowed to interview,
 11 at least, some of the non-shooting officers. The Family has identified the following information
 12 that it needs in order to adequately prepare for the inquest hearing. The information identified
 13 below can only be obtained from pre-inquest interviews of SPD officers and civilians who are
 14 currently refusing to “voluntarily” provide testimony because each witnesses’ statement did not
 sufficiently address these areas.

<p>15 Officer Bandel</p>	<ul style="list-style-type: none"> • When and where did Bandel observe Officer Kennedy draw her gun? • When Bandel was in the loading dock did he see other officers? Where were they located? When did they draw their firearms? • Did Bandel observe any civilians when he entered the loading dock? Where were they positioned? • Who was the officer Bandel saw frantically pointing and where was that officer standing in relationship to the loading dock? • Why did Bandel not discharge his firearm at Mr. Butts?
<p>16 Officer Kang</p>	<ul style="list-style-type: none"> • Did Kang observe any civilians or officers when he entered the loading dock? Where were they positioned? • Did Kang observe Mr. Butts run into the loading dock or into the adjacent room? • When Kang observed officers run into the loading dock did they have their guns drawn or pointed towards Mr. Butts?
<p>17 Officer Briskey</p>	<ul style="list-style-type: none"> • What information did Briskey know when he arrived at the Federal Building?

	<ul style="list-style-type: none"> • When Briskey arrived at the scene, what did he observe? Where were the officers located? Did the officers have their guns drawn? • Details regarding the deployment of K-9 Blitz and the decision to do so • Did Briskey observe Mr. Butts being handcuffed? Did he believe Mr. Butts to be alive at the time?
Douglas Houck	<ul style="list-style-type: none"> • When Mr. Butts ran into the loading dock, how close was he? • Did Houck observe Kennedy draw her firearm? • Did Kennedy issue any commands to Houck? • Detailed explanation of Mr. Houck's changed statement between his initial interview the day of the incident and his follow-up interview, when he first said that he saw the female officer fire her gun but later said he's not sure who was firing. Who did he discuss this with? Did he read news reports? • When the female officer shot her gun, how close was she to Mr. Houck? Did you observe the other officers fire their guns? If so, where were they located when they fired? • When you went to the Owl & Thistle after this event, was that prior to you contacting the police about what you witnessed? Did you consume alcohol there? Did you discuss the incident there?

While statements were taken from civilian witnesses and law enforcement officers some important avenues of inquiry were unaddressed. The family must be able to obtain more detailed information regarding what occurred on the loading dock in order to fully prepare for the inquest. For example, information regarding: (1) how close Mr. Houck was to Officer Kennedy when she discharged her firearm; (2) when did Officer Kennedy drew her firearm; (3) why Officer Bandel did not discharge his firearm; and (4) changes in statements between first and second interviews.

The above-listed information is not just relevant but necessary information that the Family needs access to in order to be able to meaningfully question witnesses and participate in the inquest hearing. Without pre-inquest interviews, the Family will be hamstrung and placed in a worse position than the other parties, who have attorney-client relationships with the witnesses and can question them at-will while in preparation for the inquest hearing. Foregoing pre-inquest interviews would be a substantial hardship on the Family's ability to participate in the inquest hearing and would undermine the purpose of the inclusion of familial representation and the move towards a more transparent inquest process.

1 **D. The Inquest Is Not a Criminal Proceeding and Requiring the Involved Officers to**
2 **Testify or not Have Counsel Represent Their Interests in the Inquest Hearing Is**
3 **Appropriate**

4 The Involved Officers must declare whether they will testify at the inquest hearing or be
5 excluded. The Involved Officers’ argument that they cannot be required to confirm whether they
6 will testify because there are potential criminal implications fails.

7 “A coroner’s inquest is a proceeding in which a jury, instead of the coroner, determines the
8 cause of death of an individual.” *BNSF*, 192 Wn.2d at 837. “[T]he purpose of a coroner’s inquest
9 is to determine who died, what was the cause of death, and what were the circumstances
10 surrounding the death, including the identification of any actors who may be criminally liable for
11 the death.” *Id.* (citing *Carrick v. Locke*, 125 Wn.2d 129, 133, 882 P.2d 173 (1994)). Despite this
12 delegation, the conduct of an inquest remains an executive function. *In re Bos.*, 112 Wn. App. 114,
13 118, 47 P.3d 956, 957 (2002) (citing *Carrick v. Locke*, 125 Wn.2d 129, 141, 882 P.2d 173 (1994)).
14 The inquest is not meant to be an adversary proceeding, but a means by which the executive
15 determines cause of death. *Miranda v. Sims*, 98 Wn. App. 898, 903, 991 P.2d 681 (2000). Due to
16 this, although the prosecutor may use the information learned from the inquest in making charging
17 decisions, the inquest results are not binding on anyone. *Bos*, 112 Wn. App. at 118.

18 As the inquest cannot result in criminal sanctions, the Involved Officers cannot avail
19 themselves of blanket Fifth Amendment’s protections reserved for criminal defendants. Just as any
20 other witness in a non-criminal matter, the Involved Officers “need not answer questions where
21 the answer might incriminate him in future criminal proceedings.” *Alsager v. Bd. of Osteopathic*
22 *Medicine and Surgery*, 196 Wn. App. 653, 668-69, 384 P.3d 641 (2016) (internal quotation marks
23 omitted). This is because there is “no absolute right to avoid choosing between testifying in a civil
24 matter and asserting [one’s] Fifth Amendment privilege[.]” *Smith v. Smith*, 1 Wn. App. 122, 130,
404 P.3d 1001 (2017).

 Similarly, the Involved Officers cannot refuse to declare whether they will testify. The
Inquest Rules only allow for counsel of the Involved Officers *if* the “law enforcement member(s)

1 elect(s) to participate in the inquest proceeding.” Appx. 2 at 2.2. “Participate” is not defined by the
2 Inquest Rules. However, the common definition is “to take part” and “to have a part or share in
3 something[.]” *Merriam-Webster Dictionary*, available at [https://www.merriam-
5 webster.com/dictionary/participate](https://www.merriam-
4 webster.com/dictionary/participate) (last visited Oct. 29, 2019). As the only party that is required
6 to “elect to participate” in order to have attorneys present during the inquest hearing, the Inquest
7 Rules clearly require the Involved Officers to do something more than sit back and watch the
8 proceedings to meet their participation requirement. *See* Appx. 2 at 2.2. Providing testimony, and
9 declaring whether they will do so, is the only way that the Involved Officers could meaningfully
10 participate in the inquest hearing that is substantively different from the other parties, which the
11 Involved Officers seemingly acknowledge as they failed to raise any other means by which the
12 participation requirement could be met.

13 While the Inquest Rules are silent on what may be required of participating involved
14 officers, the Administrator has already determined that the Involved Officers must declare whether
15 they will testify at the inquest hearing before it occurs. This is consistent with the participation
16 requirement and it is consistent with the representation counsel made to the Administrator, the
17 Family, and SPD regarding their willingness to provide this information in a timely manner before
18 the inquest hearing.

19 The September 19th, Inquest Order in *In re Charleena Lyles* requires no other outcome. In
20 the very first pre-inquest conference, the Lyles Family raised concerns over attorney participation
21 for the shooting officers during pre-inquest conferences and the inquest hearing if there was not
22 an early declaration of an intent to testify. At such an early juncture in the inquest proceedings, the
23 Administrator determined that the shooting officers could continue to have representation in the
24 proceedings. This inquest is in an entirely different procedural posture than *Lyles*. We are just over
a month away from the inquest hearing and need resolution of outstanding issues—including
whether the Involved Officers will testify—in order for the parties to prepare for the hearing and
to ensure an orderly, timely, and efficient inquest hearing.

1 As discussed above, when construing the meaning and purpose of a statute, Washington
2 courts first look at the plain language of the statute. *HomeStreet*, 166 Wn.2d at 452. Here, the
3 Involved Officers are required to “participate” if they are to have counsel present. The participation
4 requirement only attaches to the Involved Officers and requires something more of them. In the
5 context of an inquest hearing “participate” can only be read to mean provide testimony. The
6 Inquest Rules demand that if the Involved Officers are not going to testify they cannot have counsel
7 present during the inquest hearing. As such, the Involved Officers must declare in advance if they
8 are going to testify or be excluded.

9 **III. CONCLUSION**

10 For the foregoing reasons the Family requests that you grant its Motion to Compel.

11 DATED this 29th day of October, 2019

12
13 */s La Rond Baker*

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