KING COUNTY DEPARTMENT OF EXECUTIVE
SERVICES INQUEST PROGRAM

INQUEST INTO THE DEATH OF: DAMARIUS DEMONTA BUTTS, Deceased.	No. 517IQ8013 INVOLVED OFFICERS' MOTIONS *IN LIMINE*

The Involved Officers respectfully submit the following motions *in limine*. These requests are consistent with the mandates set forth in PHL-7-1-4-EO "Conducting Inquests in King County" and the Washington rules of evidence.

1. **Motion to exclude any interrogatories that request or permit the inquest panel to opine on what policies or training may or may not be applicable.**

The executive order states that the Seattle Police Department "shall provide testimony concerning applicable law enforcement agency training and policy as they relate to the death[.]"[1] The order further states that "[t]he panel shall make findings regarding whether the law enforcement officer complied with applicable law enforcement agency training and policy as they relate to the death."[2] The order does not state, suggest or contemplate the inquest panel determining or opining on whether a particular policy or training applies. Indeed, as Capt. Teeter

[1] Paragraph 12.3, Appendix 2, PHL-7-1-4-EO "Conducting Inquests in King County".
[2] Paragraph 3.2, Appendix 2, PHL-7-1-4-EO "Conducting Inquests in King County".

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will be the only witnesses qualified to identify the applicable policy and training, there is no way for a panel to conclude that anything not identified by him could be applicable absent utter speculation. Simply put, the panel does not and will not have the requisite foundation to opine on whether a particular policy or training applies.

Moreover, the prospect of the jury finding some other policy or training applicable in the face of the department's subject matter experts' testimony would undermine the purpose of the inquest. If the department does not consider a particular policy or training to apply, it certainly would not have informed/trained its officers on that scenario. The jury's conclusion, consequently, would be meaningless and would only inject confusion into the outcome.[3]

2. Motion to exclude SPD Use of Force Policy section 8.200(5) and any policies regarding barricade subjects or questions/interrogatories related thereto.

As discussed in the previous motion *in limine*, the executive order states that SPD "shall provide testimony concerning applicable law enforcement agency training and policy as they relate to the death[.]" The inquest attorney and the Family have now had an opportunity to interview the City's representatives regarding applicable policy and training. From those interviews it is clear that Section 8.200(5) (Use of force to prevent the escape of a fleeing suspect)[4] and policies regarding barricaded subjects[5] are not applicable. Likewise, training on these topics is inapplicable. Inapplicable policies and training are not admissible and the

[3] For example, if any SPD Chief testified that the "restrained suspect" use of force provision is not applicable because it applies only where a suspect is in custody. We certainly would not permit the jurors to speculate that it applied regardless, as they would be determining policy application that never existed, and training that was never related to such incidents.

[4] The fleeing suspect policy is derived from *Tennessee v. Garner*, 471 U.S. 1 and the Supreme Court's holding that when a law enforcement office is pursuing a fleeing suspect, the officer may not use deadly force to prevent escape unless "the officer has probable cause to believe the suspect poses a significant threat of death or serious physical injury to the officer or others." There, an officer shot a burglary suspect as he attempted to flee and jump over a fence. Officers were reasonably sure the suspect was unarmed. Here, officers did not shoot Mr. Butts believing he was fleeing (or unarmed). Officers shot Mr. Butts after he fired upon them. There is no evidence to the contrary.

[5] Running into a room while being pursued by law enforcement to then realize your only avenue of exit may be behind or through the law enforcement officer does not create a barricaded subject scenario.

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executive order does not support a party (other than the law enforcement agency) or the inquest panel opining on the application of a particular policy or training. ER 402. Indeed, no one other than the law enforcement agency that created, trained on, and implemented the policies and training has the requisite foundation necessary to opine on the topic.

3. Motion to exclude interrogatories about Individual Officer compliance with Seattle Police Department Use of Force Policy sections 8.200(6) and (7) regarding rendering of and request for medical aid.

The involved officers expect there will be testimony about aid provided to Mr. Butts, however, there should be interrogatories directed about Individual Officer compliance with Sections 8.200(6) and (7). Due to the nature of this incident, the involved officers were not responsible parties for purposes of rendering and requesting aid. Specifically, two of the involved officers had been shot and the other two were assisting in providing and obtaining aid for wounded officers. Moreover, the facts establish Sergeant Lang requested aid, alleviating the need for other officers to do the same. The inquest order does not provide for an assessment of adherence to policy generally by the department/uninvolved officers, but instead concerns itself with whether the involved officers adhered to policy. As this policy language is not applicable to the actions of the individual officers, it should not be presented to the panel in the form of a compliance question.

4. Motion to exclude interrogatories about whether an officer or Butts fired first.

A question as to whether an officer or Butts fired their weapon first is neither relevant nor helpful. Indeed, it only creates confusion and promotes a dangerous narrative. For example, if Officer Kennedy testifies Butts raised his gun and she fired her weapon in response, an inquest panel may conclude she fired her weapon first. The Family contends this information is highly probative because it goes to whether an officer's use of force was justified. However, Officer

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Kennedy's actions would be wholly justified in the above scenario. The question as it exists, with no context, will only create confusion and become fodder for a false narrative.

5. Motion to exclude proposed Exhibit 123 (Photo of Kang's Ballistic Vest).

During Officer Kang's testimony that occurred on February 7, 2022, the Family's counsel presented Officer Kang with an image of his ballistic vest (Ex. 123) and asked him several questions about the patches on his vest. Neither the image nor the questions related to the image are relevant to the inquest and should be excluded. ER 402. For example, no interrogatory questions relate to Kang's ballistic vest or its use in the inquest. Nor is there any suggestion that the patches on his vest bear any relevance to the facts and circumstances of Mr. Butts' death. The Exhibit is irrelevant. If the Administrator is inclined to present an image of his vest, then Slide 41 of Exhibit 62 should be utilized as it shows Kang's vest as found at the scene where he was briefly treated by fellow officers for his injuries.

6. Motion to exclude images of Damarius Butts' body (Exhibits 19, 20, 62, 120).

The images of Mr. Butts' body contained in Exhibits 19, 20, 62 (slides 56, 99, 112) and 120 are highly prejudicial, confusing, inflammatory and should be excluded under ER 403. Typically, images of a decedent's body only have probative value when they are used to illustrate or explain the testimony of a pathologist and/or a forensic examiner at the time of trial. *State v. Yates*, 161 Wn.2d 714, 768, 168 P.3d 359 (2007) (citing *State v. Lord*, 17 Wn.2d 829, 870, 822 P.2d 177 (1991). Ultimately, the question with respect to photos of Mr. Butts' body is whether their probative value outweighs their prejudicial effect. *See State v. Stackhouse*, 90 Wn. App. 344, 357-58, 957 P.2d 218 (1998).

Here, neither the Inquest Attorney nor the Family have or can establish that the images of Mr. Butts' body in 19, 20, 62 (slides 56, 99, 112) and 120 offer any probative value other than

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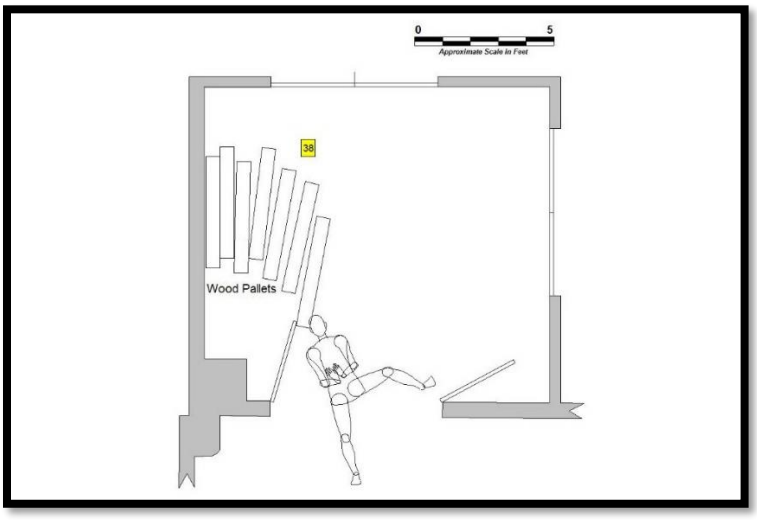
Mr. Butts' location. That information is readily available in other evidentiary sources, however, that are not prejudicially gruesome, including the Total Station scene diagram that precisely identifies all relevant information related to his location and other, nearby evidence (e.g. Kang's weapon). The veracity of the diagram in not in question. Officer Kang's testimony shows that the gory photos are unnecessary to any explanation of locations (he was shown a photo of the vestibule after Mr. Butts' body was removed for reference). The below image created through Total Station is just as probative of any photo that includes images of Mr. Butts' body, but far less prejudicial and there are numerous other images that provide the same probative effect but without the jury inflammation created by showing Mr. Butts' body.



The photos are also unnecessary for purposes of identifying Mr. Butts' injuries. The Medical Examiner Brian Mazrim was interviewed about his examination and was never shown a photo of Mr. Butts' body and never required the same to establish Mr. Butts' injuries. In sum, all the photos of Mr. Butts' body at the scene are gruesome and too inflammatory to be admissible under ER 403.

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7. Motion to exclude questions surrounding the robbery at 7-11.

During Officer Kang's testimony he was asked several questions by the Family's counsel about the robbery that took place at 7-11 with an emphasis on the fact that he did not witness the robbery and had no personal knowledge about the items stolen or whether a gun was used in the robbery. The Family previously stipulated to the robbery and Butts' possession of the gun during the robbery and at the Federal Building. Consequently, there is no reasonable basis to question individuals that were not present during the robbery about the fact they were not present and did not witness the event. The only reason for this line of questioning would be to discredit what occurred or suggest the officers unreasonably relied on information about the robbery from dispatch.

If the Administrator is going to permit this line of questioning, then every witness with factual information about the robbery must be summoned to testify so that the panel may be provided a full and transparent review of the facts and circumstances.

8. Motion to exclude attorney summation.

While the executive order contemplates the use of statements of summation, the Administrator has the authority and discretion to reject said statements. The Administrator should reject any summation efforts as inconsistent with the purpose of the inquest and the language of the executive order.

First, "[t]he inquest is intended to be a fact-finding, non-adversarial process." A summation statement serves no purpose but to promote a particular party's view of the evidence (i.e., position). However, the parties' perception of the evidence is not relevant. Only the panels viewpoint matters as it will make findings surrounding the evidence and "shall deliberate and

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panelists shall exchange ***their*** interpretations of the evidence." A summation only seeks to color the panel's interpretation and runs contrary to the purpose of the proceeding.

Second, the panel may only consider testimony or evidence presented during the inquest proceeding.[6] A parties' summation is neither testimony nor evidence – it is argument that the panel may not consider in making its findings. Accordingly, it serves no relevant purpose.

9. Motion to exclude hypothetical questions regarding training and policy.

The Administrator should exclude any efforts to utilize hypotheticals to identify compliance or non-compliance with policy and/or training. During the interviews of Asst. Chief Cordner and Captain Teeter, Family counsel asked hypothetical questions that incorporated facts and circumstances comparable to the facts of this inquest and asked how those facts applied to particular policies and training. This type of questioning should be prohibited, as the executive order does not permit the law enforcement agency (or anyone else for that matter) to "comment on whether employees' actions related to the death were pursuant to training and policy; or any conclusions about whether the employee's actions were within policy and training." Hypothetical questions invite violation of the executive order and, more importantly, they are ripe with speculation.

Moreover, testimony upon such hypothetical circumstances would serve no purpose. The inquest process is to evaluate whether involved officers complied with policy and training under the circumstances presented. Whether a particular policy or training would also apply to a different situation is wholly irrelevant.

[6] Paragraph 14.3, Appendix 2, PHL-7-1-4-EO "Conducting Inquests in King County."

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10. Motion to exclude the involved officers' *Garrity* statements.

The Administrator has already determined *Garrity* statements are not precluded in inquests; however, the statements' admissibility must still be supported by an evidentiary basis. To date, no one has presented a valid evidentiary basis to support admission.

The statements are hearsay and no exception applies. The Administrator previously alluded to their admissibility under ER 801(d)(2). However, as set forth in the executive's order, "[t]he inquest is an administrative hearing intended to be a fact-finding, non-adversarial process….The proceedings are quasi-judicial in nature, with represented parties, and the presentation of evidence through direct and cross-examination...[and] [a]lthough an inquest is not a court proceeding, administrators shall be guided by open courts principles and GR 16." Based on the plain language of the executive order, the involved officers are not party opponents.

ER 801(d)(2) unequivocally removes the hearsay barrier only when the statement is offered against a "party opponent" – an adversary. Here, the executive order is clear that the parties to the inquest are not adversaries. Indeed, the Administrator has repeatedly noted that this is a non-adversarial process at pre-inquest conferences, a proposition supported by the order and with which the parties have agreed.

Although no Washington case has addressed this issue in the inquest context, cases which have considered like arguments have rejected the party-opponent contention. In *United States v. Gossett*, 877 F.2d 901 (11th Cir., 1989), *cert. denied*, 493 U.S. 1082, 110 S.Ct. 1141, 107 L.Ed.2d 1045 (1990), defendant attempted to offer the statements of a codefendant, which would have inculpated the co-defendant and to some extent exculpated Gossett. The court reasoned:

> Gossett contends that this testimony was admissible as a nonhearsay admission against a party opponent under Fed. R. Evid. 801(d) (2); as a statement against penal interest, a hearsay exception under the Fed. R. Evid. 804(b)(3); or for impeachment purposes under Fed. R. Evid. 607. The district court properly excluded this evidence. The testimony was

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> not admissible under ER 801(d)(2) because the admission sought to be introduced was made by a co-defendant who is not a party-opponent. The Government is the party-opponent of both defendants.

877 F.2d at 906. Here, there is no prosecutor, plaintiff or defendant (i.e., opposing parties). Likewise, in *United States v. Harwood,* 998 F.2d 91 (2d. Cir. 1993) the court affirmed that defendant Harwood could not offer codefendant McKee's statements that "Harwood was in the wrong place at the wrong time" and "the same would have happened to any person driving a vehicle in which he [McKee] was a passenger." Defendant Harwood sought to admit the statements as statements of a party-opponent, Fed.R.Evid. 801(d) (2) (A). The appellate court held:

> We reject Harwood's argument that McKee's statements were admissions by a party opponent 'because the admission sought to be introduced was made by a co-defendant who is not a party. The Government is the party opponent of both defendants.' (citations omitted).

998 F.2d at 97-98. Because the *Garrity* statements made by officers cannot be classified as statements of a party opponent, they are hearsay.

The statements are equally inadmissible under ER 804 as the declarants are not unavailable to testify. A declarant is only unavailable when they have been subpoenaed and continue to refuse even in the face of contempt. *See State v. Wilder*, 25 Wn. App. 568, 608 P.2d 920 (1982). The circumstance contemplated by ER 804(a)(2) does not exist here.

In sum, while the Administrator has ordered the statements are not precluded under *Garrity v. New Jersey*, 385 U.S. 493 (1967) and *In Re Young*, 122 Wn.2d 1, 50 (1993), however, the statements are still hearsay and no exception exists under the rules of evidence permitting their presentation to the inquest panel.

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11. Motion to include Adriana Butts as a witness or, alternatively, to submit her recorded interview to the inquest panel.

The Executive order states:

> The inquest is intended to be a transparent process to inform the public of the circumstances of the death of a person that involved a representative of government. As such, there is a strong presumption against the exclusion of witnesses until after their testimony, and relevant, non-cumulative witnesses should only be excluded by the administrator in exceptional circumstances.

Paragraph 12.4, Appendix 2, PHL-7-1-4-EO "Conducting Inquests in King County."

Adriana Butts is a key fact witness with personal knowledge surrounding the facts and circumstances of Mr. Butts' death. Importantly, she was present with him during the 7-11 robbery and during interactions with law enforcement. Her testimony is vital to corroboration and credibility of other witnesses. Further, Ms. Butts provided Mr. Butts with the gun that was shown to Mr. Yohannes in the 7-11 robbery and that was used to shoot multiple officers. There is no basis to exclude her live testimony other than inability to procure her attendance. Indeed, no one has identified any "exceptional circumstances" as required under the executive order to excluding her testimony. *Id*.

If she cannot be made available to testify, then the Involved Officers request that the interview she provided to homicide detectives be played for the inquest panel. In the interview she details the events of that day, including the events at 7-11 and interactions with law enforcement – highly relevant, factual information surrounding the manner and circumstances of Mr. Butts' death.

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DATED this 14th day of February, 2022, at Seattle, Washington.

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CERTIFICATE OF SERVICE

I certify that on the 14th day of February 2022, I caused a true and correct copy of this document to be served on the following in the manner indicated below:

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