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KING COUNTY DEPARTMENT OF EXECUTIVE  
SERVICES INQUEST PROGRAM

<p>INQUEST INTO THE DEATH OF:  DAMARIUS DEMONTA BUTTS,  Deceased.</p>	<p>No. 517IQ8013  INVOLVED OFFICERS' BRIEFING RE: ADVERSE INFERENCE INSTRUCTION</p>
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**INTRODUCTION**

“The inquest, is an administrative hearing intended to be a **fact-finding, non-adversarial** process.”

PHL-7-1-50 EO (2021), Appendix 2, ¶ 1.1

“**Inquests are not meant to be conducted as adversarial trials**, but are instead fact-finding proceedings aimed at exploring the circumstances giving rise to the inquest.”

*Declaration of Michael Spearman, King County Case No. 20-2-01420-6 SEA*

“A trial judge who conducts an inquest stands in the shoes of the county coroner or county executive, and **inquest proceedings are purely advisory, nonadversarial proceedings** designed to help the coroner determine the cause of death.”

*In re Death of Boston*, 112 Wn. App. 114, 117 (2002).

1 **ARGUMENT**

2 There is no basis for an adverse inference in this proceeding for several reasons:

3 *First*, while scenarios exist in civil proceedings where an adverse inference can be drawn  
4 from a party’s invocation of her Fifth Amendment right,<sup>1</sup> this is not that proceeding. An inquest  
5 is a “nonbinding factual inquiry and does not result in a determination of guilt or responsibility.”  
6 *Miranda v. Sims*, 98 Wn. App. 898, 903 (2000) (citing *Carrick v. Locke*, 125 Wn.2d 129, 133  
7 (1994). Our Supreme Court’s statement that the Fifth Amendment privilege can be asserted on a  
8 question-by-question basis “in noncriminal proceedings like coroner’s inquests,”<sup>2</sup> in no way  
9 held, suggested, or even invited the idea that such invocation carries with it an adverse  
10 instruction.

11 The use of an adverse inference instruction is premised on the idea that courts must  
12 balance one party’s assertion of her constitutional right against her adversary’s right to a fair  
13 proceeding. *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 518 (1st Cir. 1996). In other words, in an  
14 adversarial proceeding the inference *may* be raised if needed to keep things fair. The  
15 fundamental requirement of an adversarial proceeding does not exist here. Indeed, allowing an  
16 adverse inference would *create* adversity and violate the purpose of the inquest.

17 *Second*, even if the inquest could be qualified as a proceeding that would merit the use of  
18 an adverse instruction, it is not automatic and would not be appropriate here. “Because the  
19 privilege is constitutionally based, the detriment to the party asserting it should be no more than  
20 is necessary to prevent unfair and unnecessary prejudice to the other side.” *SEC v. Graystone*  
21 *Nash, Inc.*, 25 F.3d 187, 192 (3d. Cir. 1994). Ultimately, a negative inference may not be drawn  
22 against a civil litigant’s assertion of her right against self-incrimination unless the adverse party

23 \_\_\_\_\_  
<sup>1</sup> See *SEC v. Colello*, 139 F. 3d 674, 677 (9th Cir. 1998).  
<sup>2</sup> *Family of Butts v. Constantine*, 198 Wn.2d 27, 64 (2021).

1 (1) can establish a substantial need for the information and (2) that there is no other less  
2 burdensome way of obtaining that information. *Doe v. Glanzer*, 232 F.3d 1258, 1265 (9th Cir.  
3 2000).

4 A delicate balancing test is required prior to the administration of an adverse inference.  
5 Here, it is highly suspect as to whether the coroner even possesses the authority to conduct such  
6 a balancing test. Even if he or she does, the Family (the party requesting the instruction) has not  
7 identified the information it intends to elicit from particular questions, the importance or  
8 “substantial need” of said information, whether alternative means exist to obtain the information,  
9 or whether more appropriate remedies aside from an adverse instruction exist. *See Serafino*, 82  
10 F.3d 15 518-19. In sum, the cart is way before the horse.

11 *Last*, while in inquest is not technically a criminal proceeding, it is certainly closer to a  
12 criminal proceeding than it is to a civil proceeding. No inquiry to the inquest panel asks them to  
13 establish foundational findings for a potential civil action, yet the *Butts* court has identified an  
14 inquest proceeding as “one of four ways” to establish probable cause for a criminal charge.  
15 Under such circumstances an adverse instruction would be wholly inappropriate. Courts  
16 uniformly recognize that an adverse inference would be improper in a probable cause finding  
17 proceeding like a grand jury investigation. *See, e.g., United States v. Benjamin*, 852 F.2d 413,  
18 421 n.7 (9th Cir. 1988), *rev’d on other grounds*, 490 U.S. 1043, (1989) (“Courts have  
19 recommended, but not required, that the prosecutor instruct the grand jury to draw no adverse  
20 inferences from assertions of privilege.... Where, as here, the prosecutor repeatedly elicited  
21 assertions of privilege, some cautionary instructions would have been appropriate.”); *State v.*  
22 *Turner*, 300 Kan. 662, 681, 333 P.3d 155, 167 (2014) (grand jury indictment overturned due in  
23 part to suggestion that invocation of the Fifth Amendment required an adverse inference).



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## CERTIFICATE OF SERVICE

I certify that on the 11th day of March 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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