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-7-1-2-EO "Conducting Inquests in King County" and the Washington rules of evidence.

On November 26, 2019, the parties conferred and attempted to reach agreement on motions *in limine*. The agreed upon motions are identified herein.

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

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

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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 Chief Cordner and Capt. Teeter 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 them 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]

Current interrogatories nos. 87, 89, 91, 93, 95, 97, 99, and 101 should be removed and interrogatories nos. 88, 90, 92, 94, 96, 98, and 100 should be replaced with the following language or something substantially similar:

> **Interrogatory No. __**: If you found that Officer [INSERT NAME] fired her handgun at Damarius Butts, did Officer [INSERT NAME] comply with the applicable Seattle Police Department policy when she fired on Damarius Butts?
>
> The applicable Seattle Police Department policy reads as follows:
>
> [INSERT APPLICABLE POLICY LANGUAGE OR DIRECT PANEL TO DOCUMENT WITH POLICY LANGUAGE]
>
> YES _____ NO _____ UNKNOWN _____
>
> **Interrogatory No. __**: If you found that Officer [INSERT NAME] fired her handgun at Damarius Butts, did Officer [INSERT NAME] comply with the applicable Seattle Police

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

[3] For example, if Chief Cordner 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.

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Department training[4] when she fired her weapon at Damarius Butts?

YES _____ NO _____ UNKNOWN _____

These interrogatories are consistent with the executive order and prevent improper speculation and confusion.

2. Motion to exclude Seattle Police Department Use of Force Policy section 8.200(5) and any policies regarding barricade subjects.

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 manager and the Family have now had an opportunity to interview Asst. Chief Cordner and Captain Teeter regarding applicable policy and training. Asst. Chief Cordner indicated Section 8.200(5) (Use of force to prevent the escape of a fleeing suspect)[5] and policies regarding barricaded subjects[6] are not applicable. Captain Teeter likewise indicated training on these topics was inapplicable. Inapplicable policies and training are not admissible and the 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.

[4] Training is not outlined in a single document or course similar to a policy. Captain Teeter will testify about training generally and the panel can answer the question based on his testimony.

[5] 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.

[6] 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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3. Motion to exclude 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 may be testimony about aid provided to Mr. Butts, however, there should be no testimony regarding 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. 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 discussed and presented to the panel.

4. 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 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.

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Second, the panel may only consider testimony or evidence presented during the inquest proceeding.[7] 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.

5. Motion to exclude testimony unrelated to the facts and circumstances of death – Ann Butts testimony.

The Butts Family has expressed a desire to have Ann Butts, Damarius Butts' mother, testify about Mr. Butts' date of birth, his address, height, weight, and age on the date of his death. To the extent such information is relevant, which is scant, the medical examiner can provide it. Presenting this information through Ms. Butts is likely to arouse an emotional response rather than a rational decision among the jurors, and is thus unfairly prejudicial. ER 403.

6. 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.

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

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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.

7. Motion to exclude any comments regarding officers' election not to testify – AGREED

The executive order does not require the involved officers to provide testimony. Further, it states "a subpoena shall not be issued to the individual law enforcement officer who was directly involved in an individual's death while in the performance of his or her duties[.]" An involved officer's decision whether to testify is not relevant to these proceedings and the Administrator should exclude any comments on the topic or any effort to elicit testimony on the topic. *See* ER 402 ("Evidence which is not relevant is not admissible.")

8. 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.

As argued during the last pre-inquest hearing, the statements are hearsay and no exception applies. The Administrator 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

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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 the 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 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:

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> 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. First, under ER 804(a)(1), none of the involved officers are asserting a privilege to avoid testifying and the Administrator has not ruled they are exempt from testifying on the basis of privilege. Rather, the executive order simply notes the Administrator has no authority to require or subpoena their testimony. ER 804(a)(1) has no application in this setting. Second, none of the officers have refused to testify under ER 804(a)(2), rather they have elected not to testify. A declarant is 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), the statements are still hearsay and no exception exists under the rules of evidence permitting their presentation to the inquest panel.

9. 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.

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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 due to her incarceration.

If she cannot be made available to testify, then we 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.

DATED this 27th day of November, 2019, at Seattle, Washington.

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CERTIFICATE OF SERVICE

I certify that on the 27th day of November, 2019, 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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DATED this 27th day of November, 2019, at Seattle, Washington.

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