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KING COUNTY DEPARTMENT OF EXECUTIVE SERVICES
INQUEST PROGRAM

INQUEST INTO THE DEATH OF:

ALBERT WAYNE FREDERICKS, JR.,

Deceased.

Inquest No.: 17IQ427069

**INVOLVED OFFICERS’
MOTION TO EXCLUDE THE
FAMILY’S POWERPOINT
“TIMELINE” AS A
DEMONSTRATIVE EXHIBIT**

Seattle Police Department Officers Timothy Oliverson, Jacob Rogers, Garret Hay, Nathan Jerome, and Andrew Swartz (the “officers”), by and through their counsel, Karen L. Cobb and Delaney DiGiovanni of Frey Buck, P.S., submit this briefing regarding the PowerPoint presentation and slides prepared by “expert” witness, Josh Cohen, for demonstrative use during the inquest and ask that the exhibit be excluded for the reasons explained herein.

I. The Officers Do Not Object to Use of a Synced Video.

The officers’ original objection included the intended use of the proposed synced video compiled from the five main body-worn videos. Having had their own expert review and analyze said video, the officers withdraw any general objection thereto. The officers agree that

1 the synced video presents a neutral, albeit potentially confusing and duplicative, exhibit for the
2 jurors, as they will view the relevant portions of the individual officers' videos as well.

3 The officers do object to use of either of the family's two *current versions* of the synced
4 video, as one stops short of containing all relevant footage and one includes footage of events
5 occurring well after the officers' involvement, including the officers being compelled to give
6 statements to a supervisor. The officers recommend that the Parties stipulate to use of the longer
7 video, so long as it is terminated at 40:00, which is after the EMTs have exited the ambulance,
8 SFD has taken over care of Mr. Fredericks and has advised that they do not need anything further
9 from the officers. These events occur just prior to the officers being compelled to give "public
10 safety statements" to a supervisor, which statements are protected under Garrity and are,
11 nonetheless, outside of the scope of the fact-finding intent of the inquest.¹

12 **II. The PowerPoint and Individual Slides Should be Excluded.**

13 While the videos, synced and individually, are actual and accurate evidence of the facts
14 surrounding the death of Mr. Fredericks, the PowerPoint made up of short video clips and
15 screenshots containing the family's adversarial spin on what appears on film, is not proper
16 evidence and must be excluded. ER 401-403. The PowerPoint as currently presented does not
17 fairly and accurately represent the events as they occurred, is likely to be confusing and have a
18 prejudicial effect on the jury and would invade the province of the jury by providing the family's
19 subjective and unsupported characterizations as "fact."

20 The stated intent of an inquest is to allow the jury panel to determine the facts and
21 circumstances surrounding the death of Mr. Fredericks by answering interrogatories after being
22 presented all relevant evidence and witness testimony. The inquest is intended to be a fact-

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¹ *Garrity v. New Jersey*, 385 US 493 (1967)

1 finding, *non-adversarial* process. PHL-7-1-5-EO, Appx 2, 1.1. A coroner’s inquest is also not a
2 culpability-finding proceeding. *Family of Butts v. Constantine*, 198 Wn.2d 27, 46, 491 P.3d 132,
3 144 (2021) (emphasis added), citing *State v. Ogle*, 78 Wn.2d 86, 88, 469 P.2d 918 (1970). While
4 the Rules of Evidence (“ER”) apply generally, the Administrator has the discretion to construe
5 the ER in a manner consistent with the goal of administrative fact-finding proceedings, including
6 promotion of fairness in the proceedings. PHL-7-1-5-EO, Appx 2, 3.3.

7 **A. The PowerPoint is Not Proper Demonstrative Evidence.**

8 To be clear, the officers do not object to the family using *unaltered* video clips or
9 screenshots taken from the various body-worn videos, and they intend to do so themselves. They
10 do object to the family’s subjective manipulation of the video clips/screenshots by insertion of
11 subjective and inaccurate “descriptions” and “analysis” of what the family asserts is happening
12 in the clips. For the reasons explained below, the PowerPoint in its enhanced form is improper
13 and must be excluded.

14 1. Use of the PowerPoint would violate ER 701.

15 The family claims that the PowerPoint prepared by “expert” Josh Cohen with direction
16 from the family’s attorneys, is not expert evidence, but merely a “demonstrative exhibit.”
17 However, the family clearly intends to use said demonstrative to present their *adversarial view of*
18 *the facts*, not the *objective facts*, as required by the Inquest Rules and Rules of Evidence. In its
19 attempts to do so, the PowerPoint is rife with descriptions, illustrations, judgments, and opinions
20 embedded in a manner that makes clear the presentation was prepared by an expert, thus must
21 carry with it factual credibility. Although that is demonstrably not the case, the jury is likely to
22 accept the embedded “facts” presented as truth. By its characterizations and alterations, the
23

1 family is telling the jury what they *should* see rather than allowing the jury to judge what they *do*
2 see by watching the unaltered videos.

3 Either way, it is unclear how the family could present these altered and subjective slides/
4 video clips through any witness without an expert describing why the photos and videos were
5 altered and characterized as they are. As the jury will be instructed, counsel’s statements are not
6 evidence. Without an expert to present and explain the evidence, the use of the PowerPoint will
7 violate ER 701. ER 701 prohibits opinion testimony by a lay witness if the witness is not
8 testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to
9 those opinions or inferences which are (a) rationally based on the perception of the witness, (b)
10 helpful to a clear understanding of the witness' testimony or the determination of a fact in issue,
11 **and** (c) not based on scientific, technical, or other specialized knowledge within the scope of rule
12 702. ER 702 reads, “if scientific, technical, or other specialized knowledge will assist the trier of
13 fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by
14 knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion
15 or otherwise.

16 Although prepared by an “expert”, analysis of the PowerPoint as a whole, and in its
17 discrete parts, reveals that the slides contain errors, inaccuracies, lack of context and/or biases in
18 multiple categories. Many appear to contain expert opinion or expert video analysis, though
19 without any foundation, and with demonstrably inaccurate conclusions. *See Cobb Declaration,*
20 *Exhibit A, Report of William Neale.* Allowing usage of the PowerPoint without any expert
21 testimony laying the foundation would violate ER 701.

22 2. The demonstrative PowerPoint exhibit should be excluded under ER 401-403.

1 The blatant inaccuracy and lack of foundation for the PowerPoint calls for its exclusion
2 as evidence. While the use of demonstrative evidence is generally favored, the trial court is given
3 wide latitude in determining whether or not to admit demonstrative evidence. *State v. Lord*, 117
4 Wn.2d 829, 855-856, 822 P.2d 177, 193 (1991) (overruled in non-relevant part and distinguished
5 on other grounds), citing *State v. Chapman*, 84 Wn.2d 373, 378, 526 P.2d 64 (1974); 5 K.
6 Tegland, Wash. Prac., *Evidence* § 94, at 300 (3d ed. 1989). Illustrative evidence is appropriate to
7 aid the trier of fact in understanding other evidence as long as the evidence is accurate. *See Lord*,
8 *supra*, citing *Norris v. State*, 46 Wn. App. 822, 827, 733 P.2d 231 (1987). Washington courts
9 “encourage the use of demonstrative evidence ‘if it accurately illustrates facts sought to be
10 proved.’” *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 331-332, 189 P.3d 178, 194-195
11 (2008), citing *Jenkins v. Snohomish County Public Util. Dist. No. 1*, 105 Wn.2d 99, 107, 713
12 P.2d 79, 84 (1986). If evidence does not accurately illustrate the fact of the matter, it should be
13 deemed not relevant and excluded pursuant to ER 401-402. However, even relevant “evidence
14 may be excluded if its probative value is substantially outweighed by the danger of unfair
15 prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay,
16 waste of time, or needless presentation of cumulative evidence.” *State v. Caril*, 23 Wn. App. 2d
17 416, 433, 515 P.3d 1036, 1044 (2022), citing ER 403.

18 For example, a demonstrative summary "can help the jury organize and evaluate evidence
19 which is factually complex and fragmentally revealed in the testimony of a multitude of
20 witnesses throughout the trial." *Lord, supra*, citing *United States v. Lemire*, 720 F.2d 1327, 1348
21 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984). However, because a summary can be a
22 very persuasive and powerful tool, the court must make certain that the summary is based upon,
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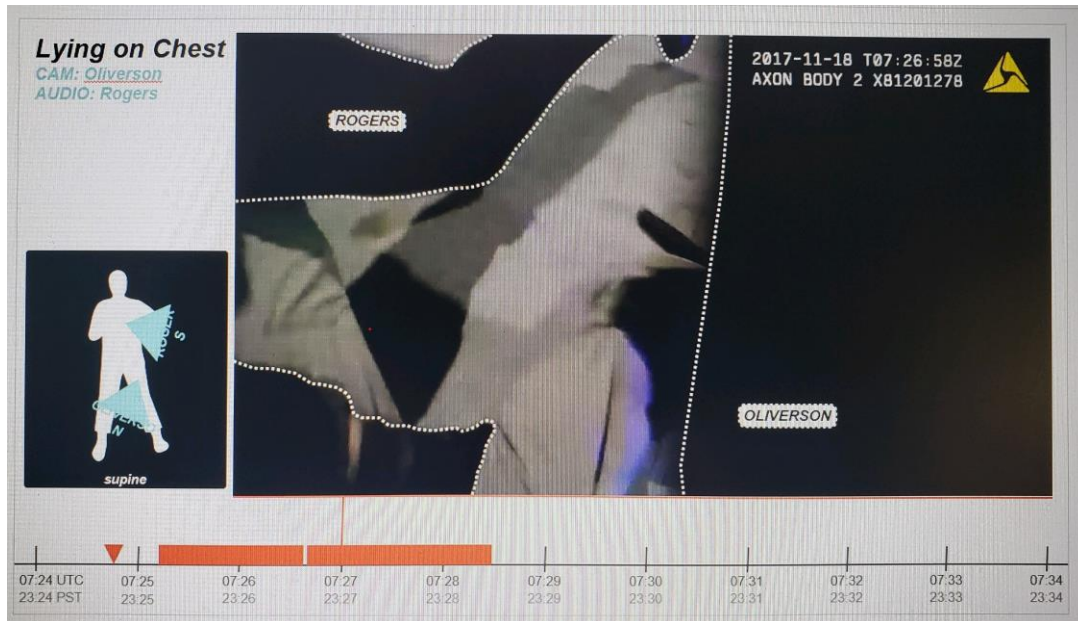
1 and fairly represents, competent evidence already before the jury. *Lord, supra*, citing *United*
2 *States v. Conlin*, 551 F.2d 534, 538 (2d Cir.), *cert. denied*, 434 U.S. 831 (1977).

3 Where demonstrative evidence is not sufficiently similar to the conditions of the case at
4 hand, the court may allow the same evidence in another medium. *State v. Arndt*, 194 Wn.2d 784,
5 810, 453 P.3d 696, 710 (2019). Here, that other medium is simply the unaltered videos or
6 clips/screenshots of the same. The Administrator must subject the PowerPoint to ER 403's
7 balancing test, whether its probative value is outweighed by other considerations. When
8 demonstrative evidence is likely to confuse the jury, raises collateral issues, cause speculation
9 and/or is more prejudicial than probative, courts should refuse its admission. *Jenkins v.*
10 *Snohomish County Public Util. Dist. No. 1*, 105 Wn.2d 99, 107, 713 P.2d 79, 84 (1986).

11 As noted above, analysis of the family's "demonstrative" PowerPoint exhibit as a whole,
12 and in its discrete parts, reveals that the slides and clips contain errors, inaccuracies, lack of
13 context and/or biases in multiple categories. Many appear to contain expert opinion or expert
14 video analysis, though without any foundation, and with demonstrably inaccurate conclusions.
15 *Exhibit A*. Notable examples are as follows:

16 There are slides named "Lying on Chest" and "Pinned Legs and Arm." The slides that
17 contain characterizations of what is occurring in the scene suggest that some sort of scientific
18 analysis was used to determine position, distances, and spatial relationships between the officers
19 and Mr. Fredericks, which are central issues to this inquest. However, according to the officers'
20 expert witness, William Neale, Cohen did not utilize any scientific analyses or accepted
21 methodologies to determine the position, orientation or spatial relationship between the officers
22 and Mr. Fredericks, despite the titles and pictorial images of each slide suggesting otherwise.
23 *Exhibit A, pp. 1; 5*. Video analysis, and specifically the measurement of time, distance, and

1 spatial relationships between objects and people in the video is a well-known and published area
2 of expertise. There are process and methodologies that are peer reviewed, created for the purpose
3 of determining things, such as whether an officer was “Lying on Chest”, or if Mr. Fredericks had
4 “Pinned Legs.” *Id.*, p. 5. On several slides, the conclusion arrived at by Mr. Cohen, or someone
5 else, are demonstrably inaccurate and false. *Id.*



15 Slide #6 in the PowerPoint is titled “Lying on Chest” and contains video from the BWV of
16 officer Oliverson only. The clipped time range of the video in this slide is from 07:26:58 to
17 07:27:15. There is pictorial commentary on this image. Figure 8 (in Exhibit A, the Neale Report)
18 depicts this slide. *Id.*, p. 11, The title “Lying on Chest” is misleading and false, since it suggests
19 that the officers are lying on Mr. Fredericks chest. Analysis of the video itself show this
20 conclusion is demonstrably inaccurate. *Id.* Analysis of the video, and the location of the Body
21 Worn Camera (which is chest mounted), show that there is continual space between the officers
22 and Mr. Fredericks’s chest, and even movement and rolling by Mr. Fredericks which would not
23 be possible if the officers were lying on Mr. Fredericks chest. *Id.*, p. 12. Figure 9 depicts the

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location of the Body Worn Video on the officer’s chest. *Id.* Review of the video shows that the chest of the officers is clear of Mr. Fredericks chest, thus it is not possible for the officers to be “Lying on Chest”. Even the pictorial image does not actually show the officers “Lying on Chest” despite the characterization provided on the slide. *Id.*



Slide #7 in the PowerPoint is titled “Pinned Legs and Arm” and contains video from the BWV of Officer Rogers only. The clipped time range of the video in this slide is from 07:28:47 to 07:29:11. There is pictorial commentary on this image. Figure 10 depicts this slide. *Id.*, p. 13. The title “Pinned Legs and Arm” is inaccurate and misleading. Though the left hand of Mr. Fredericks is being held down, the legs are not pinned in this video sequence. Review and analysis of the video show distance between the officers and Mr. Fredericks legs, and movement that is not consistent with his legs being pinned. *Id.*

1 Further analysis of both slides #6 and #7 shows Mr. Fredericks represented as a scaled
2 figure, lying on his back and covered by officers represented as triangles. The use of triangles to
3 represent the officer's positions and orientation is inaccurate and misleading, and depicting their
4 positions two dimensionally inaccurately flattens the distance between the officers and Mr.
5 Fredericks. The triangles do not represent the correct proportions or scale of the officers which
6 makes the triangles an unsuitable comparison with a scaled person that represents Mr.
7 Fredericks. The position and orientation of the officers relative to Mr. Fredericks is a central
8 issue in this inquest, and pictorial images that are not scaled correctly, oriented correctly, or
9 placed relative to Mr. Fredericks correctly are misleading and inaccurate. Peer reviewed and
10 scientific methods exist for analyzing video to precisely locate the officers and Mr. Fredericks,
11 though Mr. Cohen has not performed such an analysis. *Id.*, pp. 12-14.

12 Mr. Neale, apparently unlike Mr. Cohen, has expertise specifically related to analysis of
13 video footage and body-worn video. The publications and the methodologies Mr. Neale had
14 discussed in his report were developed by him and his colleagues at J.S. Held. *Id.*, 5-6.

15 The PowerPoint also includes what is simply evidence of the family's efforts to skew the
16 facts in such a way that the jury may be misled. For example, during the clip described as "Sits
17 Up," Mr. Fredericks is yelling and shouts, "I've never done...". The audio cuts off just before
18 Mr. Fredericks shouts "...drugs!" Of course, we know from Mr. Fredericks' toxicology report
19 that he had significant amounts of methamphetamine in his system. Obviously such deceit can be
20 remedied by playing the full clip, but it's presence is just one more example of the effort being
21 exerted by the family to unfairly skew the facts.

22 While this motion contains just a few of the most blatant examples of the fatally flawed
23 and conclusory PowerPoint, Mr. Neale's report addresses each slide and summarizes that the

1 demonstrative exhibit as presented by the family selects, characterizes, and presents events/facts
2 out of context and in a manner that is inaccurate, misleading or both, without utilizing any of the
3 existing methodologies that *could* accurately characterize the events if employed. *Id.*, pp. 1-23.
4 The PowerPoint would not only mislead the jury but cause it to speculate and potentially accept
5 the inaccurate characterizations as fact. As the demonstrative exhibit is wholly misleading and
6 inaccurate, the prejudice caused by its admission would greatly outweigh the prejudice to the
7 officers. *See Sager v. Mena*, 2018 Wash. App. LEXIS 2527, *10, 2018 WL 5802522.²:

8 The trial court first subjected the photographs in question to ER 403's balancing
9 test while resolving the pretrial motions. The court did not question the relevance
10 of the photographs but, rather, determined that, under ER 403, their probative
11 value was outweighed by the potential for prejudicial juror confusion or
12 speculation. The court reasoned that, in the absence of biomechanical expert
13 testimony, admission of the photographs could invite speculation from the jury as
14 to how damage to the vehicles shown in the photographs were manifested in the
15 injuries sustained to Sager's person.

16 *Id.*

17 Similarly, the appellate court in *Arndt* upheld the trial court's exclusion of photographic
18 evidence demonstrating how burning liquids pool and create protected areas during a fire, going
19 on to say that "in order to be admissible, demonstrative evidence must utilize experimental
20 conditions that are substantially similar to the facts of the case at hand. *State v. Arndt*, 194 Wn.2d
21 784, 809, 453 P.3d 696, 709 (2019), citing *State v. Hultenschmidt*, 125 Wn. App. 259, 268, 102
22 P.3d 192 (2004). Ultimately, the test for admissibility of an experiment [demonstrative] as
23 evidence is "whether it tends to enlighten the jury and to enable them more intelligently to
24 consider the issues presented." *Jenkins v. Snohomish County Pub. Util. Dist. No. 1*, 105 Wn.2d
25 99, 107, 713 P.2d 79 (1986) (quoting *Sewell v. MacRae*, 52 Wn.2d 103, 107, 323 P.2d 236
26 (1958)). There is nothing in the adversarial commentary in the family's PowerPoint that in any

² This unpublished case is cited pursuant to GR 14.1(a) for its persuasive value.

1 ways enlightens them to the actual facts or enables them to more intelligently consider those fact
2 and circumstances.

3 **III. Conclusion**

4 Where the PowerPoint demonstratively contains inaccuracies and false characterizations
5 of the events being depicted, and where the jury will be reviewing the unaltered video(s)
6 numerous times throughout the proceeding, the officers respectfully request that the
7 Administrator exclude the use of the family's manipulated PowerPoint as demonstrative
8 evidence.

9 DATED this 23rd day of January, 2023, at Seattle, Washington.

10 FREY BUCK, P.S.

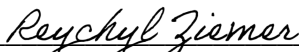
11 By: /s/ Karen L. Cobb
12 Karen L. Cobb, WSBA #34958
13 Delaney DiGiovanni, WSBA #56851
14 Attorneys for Seattle Police Department
15 Involved Officers
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Certificate of Service

I certify that on the 23rd day of January, 2023, 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 January 23rd, 2023, at Seattle, Washington.



Reychyl Ziemer, Paralegal