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NO. 98985-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

THE FAMILY OF DAMARIUS BUTTS, et al.,

Respondents/Cross-Appellants,

v.

DOW CONSTANTINE, in his official capacity as King County
Executive, et al.,

Appellants/Cross-Respondents.

APPELLANT KING COUNTY'S OPENING BRIEF

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“The recent deaths of Michael Brown in Ferguson, Missouri (a suburb of St. Louis) and Eric Garner in New York, and the social unrest these deaths have provoked, display the urgent need to consider innovative institutional arrangements to deal with official killings. The inquest . . . has the capacity to provide a significant remedy for the notorious lack of transparency surrounding officer-involved deaths.”¹

I. INTRODUCTION

Like many urban jurisdictions, King County must reconcile with the aftermath of a death resulting from police use of force. Inquest proceedings provide an important forum for public accountability where the facts and circumstances of any such death can be examined with findings issued by an inquest jury. Inquests, which date back to medieval England, serve different purposes and are wholly separate from legal systems designed to determine civil and criminal liability. As a public process, “inquests have the capacity to shine a light on public and private wrongdoing, and to provide an independent mechanism for accountability,” while promoting safety and disseminating new knowledge about risks. MacMahon at 278.

Since its adoption in 1968, the King County Charter (“Charter”) has mandated inquests as a tool for the transparent and comprehensive

¹ Paul MacMahon, *The Inquest and the Virtues of Soft Adjudication*, 33 *Yale L. & Pol’y Rev.* 275, 298–99 (2015) (“MacMahon”).

examination of police-caused deaths. Charter § 895.² The authority to conduct inquests lies with the King County Executive (“Executive”). Through a series of executive orders dating back to at least 1985, the Executive has established the “policies, procedures and rules governing inquest proceedings.” CP 1435. The “innovative” approach of King County—which combines the statutory authority of the Coroner’s Statute, chapter 36.24 RCW, and the county’s home rule charter authority to conduct meaningful inquests—has been specifically approved by this Court. *Carrick v. Locke*, 125 Wn.2d 129, 141, 882 P.2d 173 (1994) (approving executive order against challenge by police officers and security guards).

In response to local needs and public concerns, King County has continued to innovate its inquest process. CP 1437. Following detailed and collaborative public input, the Executive adopted reforms to the inquest process through Executive Order PHL 7-1-2 (“2018 EO”). He later refined the 2018 EO through the adoption of Executive Order PHL 7-1-3 (“2019 EO”) and Executive Order PHL 7-1-4 (“2020 EO”). The 2020 EO is the currently operative executive order for inquests. *See* CP 1562-

² Relevant excerpts from key constitutional, statutory, charter, and ordinance provisions are attached as Appendix A.

73 (2020 EO).³ These changes help “ensure a full, fair, and transparent review” of any death involving a law enforcement officer and determining “the facts and circumstances surrounding the death,” including “the cause and manner of death, and whether the law enforcement member acted pursuant to policy and training.” CP 1563.

Despite substantial similarity with prior executive orders and protests that they “do not oppose accountability reform,”⁴ the respondent Police Parties challenged the 2019 EO because its scope was allegedly too broad.⁵ The 2019 EO was also challenged by the families of three persons who were killed by law enforcement officers (collectively “the Families”),⁶ who claimed that its scope was too narrow. The trial court agreed with the Police Parties. It found that the Executive lacked authority to issue executive orders on inquests, struck down a key provision of the Charter as unconstitutional under Washington Const. Art. XI, § 4 (“Article XI, § 4”), and enjoined any inquest proceedings that exceeded the scope of the Coroner’s Statute. CP 2381-2406. In essence, the trial court’s order

³ A copy of the 2020 EO is attached as Appendix B.

⁴ Vol. I, Verbatim Report of Proceedings (7/17/2020) (“VRP”) at 38:8-9.

⁵ The Police Parties include the suburban cities of Auburn, Federal Way, Kent, Renton, the King County Sheriff’s Office (collectively the “Suburban Cities”) and several individual Seattle Police Department officers (“SPD Officers”). The City of Seattle originally challenged the 2019 EO before dropping its suit.

⁶ These are the family of Damarius Butts, the family of Isaiah Obet, and the maternal family of Charleena Lyles.

relegated King County to somehow conduct modern inquests under the Coroners Statute, which was originally drafted in 1854 and still retains most of its original substance.⁷ Compare chapter 36.24 RCW with Laws of 1854, p. 435 §§ 1-21.

Appellant King County Executive Dow Constantine, who is being sued in his official capacity (hereinafter “King County”),⁸ respectfully requests that this Court reverse the trial court, dissolve the injunction, and re-affirm the authority of the Executive to conduct meaningful inquests that satisfy the public’s reasonable expectations. This Court should firmly reject the Police Parties’ explicit invitation for a return to “the good old days” when inquest proceedings often demonstrated “bias for law enforcement.” VRP at 50: 3-9.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting declaratory and injunctive relief to the Police Parties declaring the 2018-2020 EOs invalid and enjoining the Executive and King County from conducting inquests outside the trial court’s overly narrow interpretation of the Coroner’s Statute.

⁷ Even this limited avenue is unavailable under the trial court’s injunction because District Court judges have declined to preside over King County inquests. CP 1437.

⁸ The “official capacity” action against Executive Constantine is an archaic way of suing the county itself. See *Triplett v. Wash. State Dep’t of Soc. & Health Servs.*, 193 Wn. App. 497, 508–09, 373 P.3d 279 (2016).

2. The trial court erred in determining that respondents' claims were justiciable, namely that they had standing to challenge the Executive Order, that their claims were not moot, and that it was within the province of the court to review the Executive's policy determinations related to inquest procedures.

3. The trial court erred by applying the appearance of fairness doctrine to executive branch inquests and by finding that certain inquest procedures, including the delegation of authority to Inquest Administrators, violated this doctrine.

4. The trial court erred in finding King County Charter § 320.20 violates Article XI, § 4 by establishing a strong executive form of government whereby all implied and residual executive authority are expressly vested in the Executive.

5. The trial court erred by applying the Fifth and Sixth Amendments of the United States Constitution to establish an absolute testimonial privilege whereby law enforcement officers cannot be compelled to testify *on any matter* at inquest proceedings.

6. The trial court erred by concluding that the Executive does not have the authority to determine the proper scope of inquest proceedings, including inquiry into police policies and training and the scope of testimony.

7. The trial court erred by finding that the Executive did not have the authority to issue Executive Orders on inquests that included provisions for pre-hearing discovery, including subpoenas.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in determining that respondents' claims were justiciable, namely that they had standing to challenge the 2020 EO, that their claims were not moot, and that the matter was properly before the court under separation of powers doctrine?

2. Did the trial court err in finding King County Charter § 320.20 violates Article XI, § 4 by establishing a strong executive form of government whereby all executive authority is expressly vested in the Executive?

3. Under the provisions of statute, ordinance and charter, does the Executive have authority to issue executive orders establishing the procedures for conducting an inquest in the Executive's name and does the appearance of fairness doctrine constrain such executive branch inquest proceedings?

4. Does the authority to conduct inquest proceedings properly include provisions for pre-hearing discovery, including the exercise of pre-hearing subpoena powers under RCW 36.24.200?

5. Does the Executive have the authority to determine the proper scope of inquest proceedings and what witnesses may be permitted to testify, including the scope of any inquiry into police practices, training and procedures when examining the circumstances surrounding the death?

6. Did the trial court err by applying the Fifth and Sixth Amendments of the United States Constitution to establish a blanket testimonial privilege whereby law enforcement officers cannot be compelled to testify *on any matter* at inquest proceedings?

7. To avoid remand and further delay: (a) may the executive inquests be live-streamed; (b) are the pending inquests timely per the Executive's determination; (c) may the County conduct inquests for deaths involving law enforcement agencies other than the King County Sheriff's Office?

IV. STATEMENT OF THE CASE

A. THE INQUEST PROCESS IN WASHINGTON AND KING COUNTY

An inquest is an investigative inquiry conducted by the executive branch, via a coroner or otherwise, where a jury is tasked with determining “who died, what was the cause of death, and what were the circumstances surrounding the death.” *Carrick v. Locke*, 125 Wn.2d 129, 133, 882 P.2d 173 (1994); RCW 36.24.040; *see also BNSF Ry. Co. v. Clark*, 192 Wn.2d

832, 837-38, 424 P.3d 50 (2019). It is not a judicial proceeding or trial and the results of an inquest are not binding on anyone. *Miranda v. Sims*, 98 Wn. App 898, 902, 991 P.2d 681 (2000); *In re Boston*, 112 Wn. App. 114, 118, 47 P.3d 956 (2002). The results of an inquest are not subject to review by the judiciary. *In re Boston*, 112 Wn. App. at 118.

Although a coroner’s inquest proceeding possesses some of the trappings more typically associated with judicial proceedings, including the empaneling of a jury, it has always been an executive branch function. The word coroner derives from “crowners,” who were elected to the position of *custos plactorum coronae*, or “keepers of the Crown.” *See generally* MacMahon at 279-85 (history of office). These “early coroners were multi-faceted royal officials, [but] their main business was conducting inquests on dead bodies in the event of a violent or unnatural death.” *Id.* at 280. The coroner’s inquest function was imported into the colonies and continued following the formation of the United States, including notable inquests into the death of Alexander Hamilton, and the decedents from the gunfight at the O.K. Corral. *Id.* at 281.⁹

⁹ Demonstrating the potential scope of inquests, the 1804 Hamilton inquest concluded that “Vice President Burr not having the fear of God before his eyes, but being moved and seduced by the Instigation of the devil . . . with force and Arms . . . feloniously willfully and of his Malice aforethought, did make an Assault . . . against the right-Side of the Belly of the Said Alexander Hamilton . . .” *Coroner’s Inquest*, National

In Washington, the 1854 territorial legislature adopted the Coroner’s Statute, whose substance continues to be reflected in chapter 36.24 RCW. For non-charter counties, depending on the population, the coroner is an elected county-wide office holder. RCW 36.16.030. When a coroner suspects that the death of a person in the county “was unnatural, or violent, or resulted from unlawful means, or from suspicious circumstances, or was of such a nature as to indicate the possibility of death by the hand of the deceased or through the instrumentality of some other person,” the coroner is vested with discretion to hold an inquest into the death. RCW 36.24.020. After hearing the evidence, the inquest jury is to render a verdict on the cause of death, the identity of the person killed, if known, when and where the death occurred, and the means of death. RCW 36.24.070. If the jury determines that the person was killed, the jury must also identify the responsible party, if known. *Id.*

King County is a home rule charter government. *King Cty. v. King Cty. Water Dists. Nos. 20 et al.*, 194 Wn.2d 830, 840, 453 P.3d 681 (2019). With the adoption of the Charter in 1968, the office of county coroner was abolished, but inquests into deaths of individuals continued under the authority of the executive branch. The Charter mandates

Archives, <https://founders.archives.gov/documents/Hamilton/01-26-02-0001-0270> (last viewed September 29, 2020).

inquests into deaths caused by law enforcement action:

An inquest shall be held to investigate the causes and circumstances of any death involving a member of the law enforcement agency of the county in the performance of the member's duties.

Charter § 895.¹⁰

For at least the last 35 years, Executives have conducted inquests into law enforcement-involved deaths under procedures specified in executive orders. The King County Code ("K.C.C.") assigns the coroner's inquest functions to the Executive. K.C.C. 2.35A.090(B), (C).¹¹ The forensic investigation of the death, including the performance of an autopsy, is the responsibility of the chief medical examiner. *See* K.C.C. 2.35A.090.

From at least 1985 to 2018, executive orders governing inquests allowed the family of the deceased, the involved law enforcement officers and their employing agency to participate in the inquest proceeding through legal counsel. CP 1451. These orders provided for the pre-inquest exchange of discovery to ensure an efficiently run proceeding, including allowances for *in camera* review and issuance of protective

¹⁰ Amendments to clarify its impact and mandate counsel for family members go before voters in November 2020.

¹¹ Under a 1969 ordinance, the inquest functions were originally assigned to the Department of Public Safety, an executive branch department. Ordinance 163, § 6. Since 1976, this function has resided directly with the Executive. Ordinance 2878, § 7.

orders for confidential materials. CP 1453.¹² They assigned the Executive's authority to preside over inquests to a District Court judge, who was assisted by a deputy prosecuting attorney. CP 1451, 1457. They mandated a proceeding that was open to the public and media. CP 1452, 1471. These executive orders also allowed participating parties to submit proposed areas of inquiry for the inquest hearing and specific interrogatories. CP 1454, 1488.

The inquest judge, sitting in the Executive's role as coroner, determined the final inquest scope, including consideration of questions like police department policy and training. CP 1454. For example, the 1985 executive order states:

The judge will determine what areas of inquiry are an integral part of the incident. In the case of a death involving a law enforcement officer, *the scope of inquiry into police department policy and training applied by the officer under the circumstances* and the involvement of other agencies and agencies will be determined in this manner.

CP1454 (emphasis added.) No executive order has allowed the jury to answer interrogatories on the civil or criminal liability of any person or agency.

¹² “Following an in camera review, the judge may order discovery of the materials if he/she finds that the interest sought to be protected by the claim of confidentiality is clearly outweighed by the interest of the requesting party in using the materials in the inquest... Protective orders [CR 26(c)] may be used to limit discovery.” CP 1453 (1985 EO at Attachment to EO, § 17(c)-(d)).

B. 2018 REFORMS TO KING COUNTY'S INQUEST PROCESS.

Particularly when examining police-involved deaths, persistent and substantial public concerns have surrounded the inquest process. Many community members viewed King County's pre-2018 inquest process as biased in favor of police interests.¹³ In response to growing community concerns, in December 2017, the Executive formed a six-member Inquest Review Committee ("IRC") to examine and propose reforms. CP 705. The IRC included representatives affiliated with law enforcement, the courts, and families of persons killed by police. CP 701.

In order to facilitate the work of the IRC, the Executive placed all five pending inquests on hold. CP 1438. He determined not to order any new inquests pending the IRC recommendations. *Id.* In January 2018, as the IRC's work was getting underway, Presiding District Court Judge Donna Tucker notified the Executive that the District Court would no longer assign judges to inquest proceedings. CP 1438-39, 1528.

In March 2018, the IRC completed its work and issued its 89-page Inquest Reform Report.¹⁴ CP 697-785. The IRC's recommendations were

¹³As the Inquest Review Committee concluded, "Comments such as 'structured through law enforcement,' or 'facts are one-sided, weighed toward law enforcement' illustrate the perception that the inquest process favors law enforcement." CP 707.

¹⁴ King County Inquest Process Review Committee Report and

informed by feedback from an estimated 204 individuals and 50 organizations who shared their experiences, ideas and recommendations.

Id.

The IRC proposed a draft executive order recommending changes to inquest procedures. Among the reforms identified, the IRC proposed:

- eliminating the prosecuting attorney’s role in the presentation of evidence;
- eliminating the use of judges to preside over inquest proceedings and having the function performed by a hearing examiner;
- empowering the inquest jury to consider issues of bias and express its views on how deaths in similar circumstances may be prevented, including, if permitted, advisory “recommendations, specifically as to changes to existing law, policy, procedure, or training”;
- limiting expert testimony to the King County Medical Examiner, except in exceptional circumstances where the testimony of other experts was found relevant to the determination of facts;
- making inquests more open by publishing schedules and recording and livestreaming the proceedings; and
- and establishing a process for educating the public on the inquest process and for ongoing review.

CP 703-05, 710-723. The IRC’s Inquest Reform Report did not propose

Recommendations (March 30, 2018) (“Inquest Reform Report”), https://kingcounty.gov/~media/elected/executive/constantine/initiatives/inquest/KC_Inquest_Committee_Report_3-30-18.ashx?la=en#:~:text=The%20inquest%20process%20in%20King%20County%20was%20intended,make%20up%20its%20own%20mind%20about%20what%20happened (last viewed September 28, 2020).

expanding inquests beyond their traditional fact-finding function into determinations of criminal or civil liability. CP 712.

Around the same time, police reforms were occurring on the state level regarding standards for evaluating deaths caused by police action. *See generally Eymann v. Wyman*, 191 Wn.2d 581, 582, 424 P.3d 1183 (2018) (discussing Initiative 940). Proponents of police reform and police interests collaborated toward agreed upon amendments to Initiative 940, which eventually passed into law under SHB 1064. Buoyed by the successful collaboration on SHB 1064, some of the same law enforcement representatives and community advocates worked together on proposed edits to the IRC's draft executive order. CP 1440. Despite notable progress, these negotiations eventually broke down. CP 1442-43. Although part of the law enforcement community was willing to proceed, other parts were not. *Id.*

C. THE 2018 EXECUTIVE ORDER

On October 3, 2018, the Executive issued new inquest procedures in Executive Order PHL 7-1-2. CP 1443. The new 2018 EO retained longstanding elements from prior executive orders, adopted many of the IRC recommendations, adopted many revisions proposed by the community coalition/law enforcement draft executive order, and added new procedures. *Id.* In short, after considering input from all the various

stakeholders, the Executive exercised his policy judgment and discretion to adopt the provisions that he believed were appropriate.

As with earlier executive orders, the Prosecuting Attorney's Office continued to perform its historic role of assembling the investigative files and recommending to the Executive whether an inquest should be held. CP 1506. The EO still mandated a "full, fair, and transparent" process. CP 1503. Discoverable material would be exchanged among the participating parties, with *in camera* review available to determine questions of confidentiality, and protective orders entered to limit discovery if necessary. CP 1508-09. And the 2018 EO reiterated that the inquest panel's task did not extend to determining issues of fault or criminal or civil liability. CP 1503.

In accord with the IRC's recommendations, District Court judges would no longer preside over the inquest. CP 703. Instead, inquests would operate under the auspices of a new program, presided over by an Inquest Administrator selected by the program manager from a roster approved by the Executive. CP 1505-06. In addition, the Prosecuting Attorney would no longer participate at the inquest and present evidence. That function now would be performed by a *pro tem* attorney assigned to assist the Inquest Administrator. *Id.* The 2018 EO also instituted development of an up-to-date webpage listing dates, times and locations of

upcoming inquests and the uploading of audio recordings when available. CP 1510. The Administrator was directed to “make the proceedings available to the public and to the media, this includes video and audio recording and still photography.” CP 1511.

The 2018 EO also adopted the draft community advocates/law enforcement proposal that “the chief law enforcement officer of the involved agency or director of the employing government department ... provide testimony concerning applicable law enforcement agency training and policy as they relate to the death.” CP 1512. However, such a witness was not allowed to comment on whether the officer’s actions complied with agency training and policy. *Id.* Such testimony could be presented by other experts and the inquest panel could make findings as they related to the death. CP 1511-13. The 2018 EO further included the community advocates/law enforcement representatives’ proposed prohibition against issuing subpoenas for law enforcement officers, stating, “except that 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 [and/or the exercise of his or her authority].” CP 1506.¹⁵ The individual involved officers were also allowed to have an attorney present if they elected to participate in the

¹⁵ As will be explained below, this provision changed in June of 2020.

inquest proceeding. However, the EO did not elaborate on the meaning of “participate.” CP 1508.

D. IMPLEMENTATION OF THE 2018 EXECUTIVE ORDER

Following adoption of the 2018 EO, executive staff hired the inquest program manager, a *pro tem* attorney, and designated a respected pool of inquest administrators comprised of retired judges. CP 1445. With the 2018 EO in place, inquest proceedings recommenced. *Id.* One of the first to proceed was the inquest into the death of Damarius Butts. CP 1446. Retired Superior Court and Court of Appeals Judge Michael Spearman was appointed as the Inquest Administrator. Beginning in June 2019, Administrator Spearman presided over a series of pre-inquest conferences with counsel for the City of Seattle, the involved Seattle Police Department officers, the Butts Family, and the Administrator’s *pro tem* attorney. CP 441-48, 546-61. Over the course of these conferences, Administrator Spearman ruled on issues concerning pre-inquest discovery, witness testimony, and livestreaming the proceedings. *Id.*

During pre-inquest conferences, questions arose concerning the degree of officer involvement in the inquest needed to constitute “participation” under the 2018 EO and allow them to have legal counsel appear in the proceeding. CP 551-61, 1508 (2018 EO App. 2, § 2.2). In a November 5, 2019 order, Administrator Spearman set a deadline for the

involved officers to confirm whether they intended to testify. CP 553-54. In that same order, Administrator Spearman denied the Butts Family's request to condition the involved officers' ability to appear by counsel during the proceedings on their agreement to testify at the inquest hearing. *Id.*

The involved officers initially defied the Administrator's deadline by indicating that they "reserved their right to testify" without confirming their intent. CP 557-58. They later clarified that they did not intend to testify at the inquest. CP 560. On November 26, 2019, Administrator Spearman accepted this response and deemed it sufficient to allow for the officers' continued participation in the proceeding through counsel. CP 560-61.

The difficulty in determining whether an officer would voluntarily testify and what constituted "participation" exposed a flaw in the 2018 EO. On December 4, 2019, shortly before the scheduled start of the Butts inquest hearing, the Executive amended the 2018 EO to clarify whether the involved officers had to testify at the inquest hearing in order to have their attorneys participate in the proceeding. CP 1446. Amendments adopted in the 2019 EO amendment explicitly conditioned participation of the officer's attorney upon the officer's willingness to testify at the inquest proceeding. CP 1521.

E. THE FAMILIES AND POLICE PARTIES CHALLENGE THE 2019 EXECUTIVE ORDER

Rather than completing the Butts matter and other inquests under the 2019 EO, respondents filed a number of lawsuits in early 2020 challenging the 2019 EO and seeking extraordinary writs and/or declaratory judgment. Their actions were consolidated under a single cause number.¹⁶ CP 1140-42. All parties agreed to a stay of pending inquests in order to adjudicate respondents' challenges. CP 1155-61.

After considering some of the challenges to the 2019 EO, the Executive determined that it was appropriate to adopt further amendments to the inquest process, which are reflected in the 2020 EO. CP 1446-47. The 2020 EO was issued on June 11, 2020 and supersedes all prior executive orders on inquests. CP 1562-73. In response to arguments from the Police Parties, the Executive determined that it was appropriate to completely remove the prior condition from the 2019 EO that an officer's legal counsel may appear at the inquest proceeding only if the officer is willing to testify. CP 1446-47, 1568 (2020 EO App. 2 § 2.2). The Executive also acceded to the Families' point that involved law enforcement officers should be subject to subpoena just like every other witness. CP 1446-47, 1566 (2020 EO App. 1 § 8.5). Due to the adoption

¹⁶ The City of Seattle also challenged the EO, but later voluntarily dismissed its suit.

of these changes in the 2020 EO, King County informed the trial court that challenges based on these provisions of the 2019 EO were moot. CP 1349, 1356.

Oral argument was heard on July 17, 2020 before the Honorable Julie Spector of the King County Superior Court. CP 2304-05. On August 21, 2020 the trial court issued an Injunction and Order (“Injunction”) that denied all applications for extraordinary writs, but granted requests from the Police Parties for injunctive and declaratory relief, striking down the 2020 EO and specifically invalidating several of its provisions. CP 2381-2406.

Although it had no briefing before it on the issue, the trial court invalidated Charter § 320.20 and declared it in violation of Article XI, § 4.¹⁷ CP 2383-2387 (Injunction at 3-7). Under Charter § 320.20, the Executive “shall be the chief executive officer of the county and shall have all the executive powers of the county which are not expressly vested in other specific elective officers by this charter.”

In its order the trial court pointed to language in Article XI, § 4 stating that “[a]ll the powers, authority and duties granted to and imposed

¹⁷ The claim that Charter § 320.20 violates the Washington Constitution (and a related claim the Charter § 320.20 conflicts with Charter § 220.20) was not squarely raised until the Police Parties injected it into their “proposed order”. CP 2346-72.

on county officers by general law . . . shall be vested in the legislative authority of the county unless expressly vested in specific officers by the charter.” CP 2383 (Injunction at 3). Based on that language, the trial court found that the language of Charter § 320.20 granting the Executive residual and implied executive powers was unconstitutional:

At issue is whether this general section of the Charter satisfies the constitutional requirement that any of the County Council's "executive or administrative powers" must be "expressly vested in specific officers by the charter." *The court concludes that it does not meet that constitutional requirement.*

CP 2385 (Injunction at 5) (emphasis added). In the trial court’s view, such residual and implied executive powers necessarily rested with the county council under Article XI, § 4. CP 2386 (Injunction at 6). In addition, the court held that Charter § 320.20 was also “in conflict with the Constitution in that it attempts to add an additional limitation that the office to which powers are delegated must be an ‘elective’ office,” rather than “specific officers” as stated in Article XI, § 4. CP 2385 (Injunction at 5 n.1).

Relying on both “appearance of fairness” concerns and supposed limitations on the authority of the Executive to adopt inquest procedures beyond the Coroner’s State, the trial court declared several provisions of the EO invalid and enjoined King County from adopting similar provisions in the future. CP 2381-2406. Among other things, the trial court’s injunction precludes:

- a. Allowance of pre-hearing written discovery;
- b. Issuance of pre-hearing "discovery" subpoenas;
- c. Introduction of evidence regarding training and policy;
- d. Limitation of the chief law enforcement officer's testimony regarding compliance with training and policies;
- e. Allowance of outside expert witness testimony; and
- f. Having an at-will employee of the Executive Branch preside over inquests.

CP 2405-06 (Injunction at 25-26). Contrary to established precedent, the trial court's injunction also grants officers a blanket privilege against testifying on any subject at inquest proceedings through a misapplication of the Fifth and Sixth Amendments. CP 2400-01, 2405-06 (*Id.* at 20-21, 25-26). Moreover, it prevents any inquiry into how policies and training contributed to a death. CP 2400-04 (*Id.* at 20-24).

V. RESPONDENTS' CLAIMS ARE NOT JUSTICIABLE

Almost all of respondents' claims are not justiciable because they challenge policy determinations within the sole province of the executive branch, lack standing to challenge inquest proceedings, and raise claims that are moot. Each claim raised by respondents must be independently justiciable on its own merits. *See League of Educ. Voters v. State*, 176 Wn.2d 808, 816, 295 P.3d 743 (2013) (although one claim was justiciable, another claim was not justiciable.). Because almost none of the claims

raised by respondents are justiciable,¹⁸ this Court should vacate the lower court's decision and remand with instructions to dismiss. *See Burke v. Barnes*, 479 U.S. 361, 365, 107 S. Ct. 734, 737 (1987) (when claim is not justiciable, remedy is to vacate and remand with instructions to dismiss.).

A. EXECUTIVE'S POLICY CHOICES ON INQUEST PROCEDURES RAISE INTRA-BRANCH ISSUES AND POLITICAL QUESTIONS THAT ARE NOT JUSTICABLE.

Inquests in King County are an executive branch function. respondents' claims are merely policy disagreements with the Executive's determination of what procedures are appropriate for inquest proceedings. Through the 2020 EO, the Executive has issued a policy directive within his own branch of government setting out procedures for conducting inquests. As a separate branch of government, the Executive has ample authority to issue executive orders containing "(1) General Policy Statements, which are intended to persuade or encourage persons, both within and without government, to accomplish the policy set out in the order; [and] (2) Directives, which serve to communicate to state agencies what the Governor would like them to accomplish." *Fischer-McReynolds*

¹⁸ The two claims that are justiciable are 1) the ability of the Inquest Administrator to ensure compliance with pre-inquest discovery by initiating issuance of compulsory subpoenas, and 2) the officers' claims that they cannot be compelled to testify on any subject due to operation of the Fifth and Sixth Amendments. Substantive argument on these claims is offered below.

v. Quasim, 101 Wn. App. 801, 813, 6 P.3d 30 (2000). Such executive orders present political questions that are not justiciable due to separation of powers concerns. *Nw. Animal Rights Network v. State*, 158 Wn. App. 237, 243, 242 P.3d 891 (2010). It is well established that the judiciary “will not interfere where doing so will ‘threaten [] the independence or integrity or invade[] the prerogatives of another [branch].’” *Brown v. Owen*, 165 Wn.2d 706, 720–21, 206 P.3d 310 (2009) (quoting *Carrick*, 125 Wn.2d at 135).

1. **The Judiciary Should Not Interfere With the Internal Functions of the Executive Branch**

In order to maintain an appropriate separation of powers, Washington courts properly avoid interfering with the discretionary duties of officers in other branches of government. *See Carrick*, 125 Wn.2d at 133 (“[The] doctrine serves mainly to ensure that the fundamental functions of each branch remain inviolate.”). Accordingly, this Court has cautioned, that in considering a writ or declaratory relief action, “the judiciary should be especially careful not to infringe on the historical and constitutional rights of . . . [a co-equal] branch.” *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994). The same rationale applies to the judiciary’s interference with executive functions. *See Eugster v. City of Spokane*, 118 Wn. App. 383, 407-08, 76 P.3d 741 (2003).

Because the 2020 EO is a directive by the Executive *within his own branch of government* to his own employee on how to conduct an executive branch function (inquests), this Court’s decision in *Brown v. Owen*, 165 Wn.2d 706, 718–19, 206 P.3d 310 (2009) strongly counsels against judicial interference. In *Brown*, this court refused to intervene in how the Senate operated its own chamber. *Id.* at 721 (“[W]e will not referee disputes over parliamentary rulings between members of the same house.”). Because the 2020 EO directs an executive branch employee on how to proceed with inquests conducted in the name of the Executive and under his authority, the trial court should not have interfered with this intra-branch function. As noted in *Brown*, when exercising its own core functions, “[e]ach of the three departments into which the government is divided are equal, and each department should be held responsible to the people that it represents, and not to the other departments of the government, or either of them.” 165 Wn.2d at 706.

2. Supposed Irregularities In Developing the 2020 EO Are Beyond Judicial Review

The trial court deemed the Executive’s process of promulgating the 2018-20 EOs “unfair” due to the perceived influence of an attorney who advocated for inquest reform and now represents the Lyles family. CP 2379 (Injunction at 17). Although the Executive denies that this attorney

exerted any improper influence,¹⁹ the trial court’s notion that it can substitute its judgement of fairness for the Executive’s judgment is fundamentally flawed. Because this is a non-justiciable political question, there is no limit to where, or from whom, the Executive might properly take input when drafting executive policy.²⁰

This Court should apply the same rule to discretionary executive enactments like Executive Orders that it applies to legislative enactments. First, there can be no requirement that the Executive consult all parties who might be interested in a policy before adopting it. *See Holbrook, Inc. v. Clark Cty.*, 112 Wn. App. 354, 365, 49 P.3d 142 (2002) (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445, 36 S.Ct. 141 (1915)). *See also Edwards v. City Council of City of Seattle*, 3 Wn. App. 665, 666–67, 479 P.2d 120 (1970) (“If everyone interested in such a

¹⁹ The trial court’s statement regarding the fairness of the drafting process is wholly unsupported by the factual record below. The attorney, Corey Guilmette, submitted a proposed draft EO on behalf of a group of community advocates and law enforcement representatives. Mr. Guilmette was representing the community advocates group at the time. CP 1439-41, 1529 – 42. He later came to represent the Lyles family, which itself presents no conflict of interest because inquests – regardless of the process – have no binding effect.

²⁰ Such limits may be found in laws on graft and corruption, but that is not the claim here. In general, the courts “presume that public officials will act within the limits of their authority and in good faith.” *Musselman v. Dep’t of Soc. & Health Servs.*, 132 Wn. App. 841, 852, 134 P.3d 248 (2006) (citing *State ex rel. Hodder v. Sup. Court*, 40 Wn.2d 502, 515, 244 P.2d 668 (1952)).

proceeding were given the full right to cross-examination and the other rights required in a judicial hearing, the process would fall of its own weight. Some concession to the shortness of life and the volume of public problems must be made if effective legislation for the entire community's needs is to be forthcoming.”).

Second, the Court should decline to second-guess the process of enacting an Executive Order. As this Court has routinely held with regard to the Legislature:

Based upon separation of powers concerns, this court has traditionally abstained from considering internal legislative functions surrounding the passage of a bill. “The legislature has plenary power to enact, amend, or repeal a statute, except as restrained by the state and federal constitutions.” *Wash. State Farm Bureau*, 162 Wash.2d at 306, 174 P.3d 1142 (citing *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wash.2d 226, 248, 88 P.3d 375 (2004)). Just as the legislature may not go beyond the decree of the court when a decision is fair on its face, the judiciary will not look beyond the final record of the legislature when an enactment is facially valid, even when the proceedings are challenged as unconstitutional. *State ex rel. Reed v. Jones*, 6 Wash. 452, 460, 34 P. 201 (1893).

Brown v. Owen, 165 Wn.2d 706, 722–23, 206 P.3d 310 (2009). The same rule should apply to policy directives issued by the Executive. Although some executive orders may create legal obligations that an individual may challenge in the courts, the fidelity of the Executive's process for adopting the order should not be open to judicial scrutiny. *Id.* at 723 (“This

doctrine is grounded in respect for the legislature's role as a coequal branch of government “in no way inferior to the judicial branch,” . . . and a rejection of the theory that the judiciary is the only branch with “sufficient integrity ... to insure the preservation of the constitution.”).

3. The Appearance of Fairness Doctrine Has No Application to Executive Branch Inquests.

Contrary to the decision below, the appearance of fairness doctrine does not permit the trial court’s foray into an executive branch inquest proceeding. The appearance fairness doctrine is intended to combat the evil of a biased judge or quasi-judicial *decisionmaker*. *State v. Post*, 118 Wn.2d 596, 618–19, 826 P.2d 172 P.2d 599 (1992); *see also City of Hoquiam v. Pub. Emp’t. Relations Comm’n of State of Wn.*, 97 Wn.2d 481, 488, 646 P.2d 129 (1982). As such, the doctrine is universally applied *only* in judicial proceedings, or administrative proceedings that adjudicate rights.

As this Court has already held, the appearance of fairness doctrine is inapplicable to executive functions, including prosecutorial inquests or coroner inquests. *In re Disciplinary Proceeding Against Petersen*, 180 Wn. 2d 768, 786, 329 P.3d 853 (2014). An inquest is not a judicial proceeding or trial. *Miranda v. Sims*, 98 Wn. App 898, 902, 991 P.2d 681 (2000). This Court has long recognized that “[a] coroner’s inquest is not a

culpability-finding proceeding.” *State v. Ogle*, 78 Wn.2d 86, 88, 469 P.2d 918 (1970); *Carrick*, 125 Wn.2d at 133. An inquest is not adjudicative or quasi-judicial because it does not apply existing law to past or present facts for the purpose of deciding or enforcing any kind of criminal or civil liability. *See In re Boston*, 112 Wn. App. at 118 (holding that an inquest proceeding is an executive branch investigatory function and not a judicial proceeding resulting in any binding determination of rights or culpability and thus not appealable); *Newlon v. Alexander*, 167 Wn. App. 195, 203, 272 P.3d 903 (2012) (coroners “are part of the executive branch and not judicial officers.”); 18 C.J.S. Coroners § 10 (an inquest is “an investigative tool designed to serve as an aid in the detection of a crime.”). In short, because inquests do not determine the legal rights of anyone, the appearance of fairness doctrine does not apply to its procedures. *Zehring v. City of Bellevue*, 103 Wn. 2d 588, 590, 694 P.2d 638 (1985) (redesign review not subject to the appearance of fairness doctrine because it did not determine the legal rights of the parties).

The Police Parties argue that the appearance of fairness doctrine must apply because inquest proceedings include many trappings of a court proceeding. But the important question is not what the proceeding looks like, but what is its function – does it actually adjudicate anything? The Court of Appeals has correctly explained that facial similarities between

inquest and court proceedings do “not change the fundamental nature of inquests from executive to judicial, from advisory to mandatory, or from an inquest to a trial.” *In re Boston*, 112 Wn. App. at 121–22.²¹ Likewise, because an inquest’s outcome is not binding, there is no “decisionmaker” that would trigger the appearance of fairness doctrine. *See Carrick*, 125 Wn.2d at 143 n.8 (appearance of fairness doctrine would not bar participation of prosecutor at inquest because the prosecutor is not a decision maker); *Post*, 118 Wn.2d at 618 (a probation officer, who provided information to a sentencing judge by way of a presentence report was not a judicial or quasi-judicial decisionmaker). There is no case holding that appearances alone trigger the fairness doctrine, especially when the actual inquest proceeding is merely advisory and binds no one.²²

The trial court, at the urging of the Police Parties, relied on *dicta* from *Carrick* to apply the appearance of fairness doctrine to executive branch inquest proceedings.²³ CP 2397 (Injunction at 17). But this was

²¹ *See also Tacoma News, Inc. v. Cayce*, 172 Wn.2d 58, 69, 256 P.3d 1179 (2011) (holding that the trappings of a proceeding did not convert a discovery deposition conducted in a courtroom into an open court proceeding).

²² Likewise, the Police Parties get nowhere by pointing out the 2020 EO and prior executive orders refer to the inquest as “quasi-judicial.” Whatever that term means in the 2020 EO, it does not denominate a proceeding that adjudicates legal rights or responsibilities, which is all that matters for application of the appearance of fairness doctrine.

²³ In *Carrick*, the sole appearance of fairness claim before the Court was

error, because the more recent *Petersen* decision holds that “[t]he [appearance of fairness] doctrine does not apply to executive functions such as prosecutorial inquests or coroner inquests.” 180 Wn.2d at 768 n.17. The *Carrick dicta* offers the observation that “appearance of fairness concerns should dictate that the inquest be held by an official exercising a high degree of independence from the Executive, who is ultimately responsible for police conduct.” 125 Wn.2d at 143. But this issue was not before the court in *Carrick* because inquests at the time were presided over by District Court judges on behalf of the Executive and the case provided no opportunity to examine appearance of fairness concerns under a different fact pattern. Even if this *dicta* somehow comprised a holding that survived *Petersen*, it still would have no application to the current case because the Executive no longer is “ultimately responsible” for the King County Sheriff’s Office, which is currently under a separately elected official.²⁴

that the prosecutor’s participation in inquests constituted an appearance of fairness violation, which was summarily rejected in a footnote. 125 Wn.2d at 143 n.8. No other appearance of fairness issues were raised or discussed in the briefing.

²⁴ In 1996, the King County Charter was amended to create an elected Sheriff. *See* Charter § 350.20.40 (Ord. 12301 § 1, 1996). Since that time, King County Sheriff Deputies have reported to an independent elected official and not to the King County Executive. Additionally, law enforcement officers of other agencies have never reported to County Executive. As such, the circumstances this Court was concerned about

In the end, the appearance of fairness doctrine cannot justify the trial court's decision to review various procedural provisions in the 2020 EO. Because inquests adjudicate no substantive rights, the appearance of fairness doctrine cannot apply. The wisdom of procedures that ultimately govern inquests is a political and policy question for the Executive not justiciable by the courts. *See Brown*, 165 Wn.2d at 719 (Political questions are “political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power.”).

B. RESPONDENTS LACK STANDING TO CHALLENGE THE 2020 EXECUTIVE ORDER ON INQUESTS

Before a court may entertain a declaratory judgment action, a dispute must be justiciable, which includes the concept of standing. *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994). As *Walker* notes, the “kernel of the standing doctrine is that one who is not adversely affected by a statute may not question its validity.” 124 Wn.2d at 419. A person challenging a policy or legislation must demonstrate “a concrete harm.” *Id.* But respondents cannot be harmed by the executive orders because inquests have no binding impact

regarding that inquest do not exist today. However, a charter amendment is pending before voters in November 2020 that, if passed, would make the Sheriff an appointed position effective January 2022.

on anyone. *See Newlon v. Alexander*, 167 Wn. App. 195, 203, 272 P.3d 903 (2012) (noting that inquest results “are not binding on anyone”). Because inquest proceedings are merely advisory and impact the rights of no one, there is no party with direct standing to challenge inquest procedures.

The issue of standing to challenge an inquest proceeding was directly addressed by the Pennsylvania appellate court in *Nader v. Hughes*, 164 Pa. Cmwlth. 434, 445, 643 A.2d 747, 752–53 (1994). Like Washington, Pennsylvania recognizes that that “the findings of the inquest jury are merely advisory to the public authorities charged with the administration of the criminal laws and are binding on no one as a judgment.” *Id.* at 444. It also recognizes that standing requires “an interest other than that of the general public which will be adversely affected by the challenged action.” *Id.* at 446 (citing various authorities). Because inquest determinations are nonbinding, the *Nader* court rejected the standing of a decedent’s father to challenge the inquest procedure. *Id.* at 446–47. *See also Hernandez v. Bennett-Haron*, 128 Nev. 580, 591–92, 287 P.3d 305, 313 (2012) (Inquest proceedings “do not result in an adjudication or determination of any of appellants’ legal rights. The sole product of the inquest process are factual findings which, in and of themselves, are not binding or entitled to preclusive effect in any future

proceeding.”).

With no concrete harm, respondents claim standing because the 2020 EO allows the family of a decedent, the involved police agency, and involved officers, to participate in the inquest hearing. But the standing question under *Walker* is not “can you participate?” Instead, standing exists only where the proceeding results in “concrete harms” like an adverse adjudication that affects legal and substantive rights. Participation alone does not make respondents any more interested in the nonbinding inquest process than the average citizen. *See Miranda v. Sims*, 98 Wn. App at 903 (holding that the family’s interest in a fair proceeding is the same as the public’s interest in a neutral inquiry into the responsibility for the death); *Patterson v. Segale*, 171 Wn. App. 251, 257-58, 289 P.3d 657 (2012) (“A party's standing to participate in an administrative proceeding, however, is not necessarily coextensive with standing to challenge an administrative decision in a court.”). Rather, the challenging party still must demonstrate injury in fact. Otherwise, persons would be able to wage court challenges against all manner of public meetings and legislative hearings that decide nothing merely because they were permitted to participate.

Respondents also cannot claim standing under Washington’s public importance doctrine, where this Court takes “a ‘less rigid and more

liberal' approach to standing" when a case is of "substantial public importance, immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture." *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419, 424 (2004). This doctrine accomplishes its less rigid approach to standing by loosening the requirements for *representational standing*, not by eliminating standing requirements like concrete harm altogether. In *Walker*, this Court pointed out that it was an "overstatement" to say that justiciability requirements have been "dispensed with" in cases of major public import. 124 Wn.2d at 415. To the contrary, even in cases of substantial public importance, "this court will not render judgment on a hypothetical or speculative controversy, *where concrete harm has not been alleged.*" *Id.* Notably, the language of the statute the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, also requires that a plaintiff must have their legal rights impacted by the law being challenged.²⁵

Standing to challenge the general inquest procedures in the 2020 EO is an insurmountable problem for respondents. Respondents cannot

²⁵ "A person ... *whose rights, status or other legal relations are affected by a statute* ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder" RCW 7.24.020 (emphasis added).

allege a concrete harm because the inquest proceeding makes no binding determinations for anyone.²⁶ Like a legislative hearing or a public meeting, it is not justiciable by the courts. In sum, because respondents have no greater *legal interest* in the outcome of the inquest or the way it is conducted than any other citizen, they lack standing to challenge the executive orders that establish its procedures.

C. OTHER JUSTICIABILITY PROBLEMS

As noted below, respondents also raise claims on matters that are moot due to passage of superseding executive orders. These questions are also not justiciable and should be denied.

VI. THE TRIAL COURT'S DECISION WAS LEGAL ERROR

A. STANDARD OF REVIEW

Although a trial court's decision to issue declaratory judgment or an extraordinary writ is reviewed for an abuse of discretion, *Nollette v. Christianson*, 115 Wn. 2d 594, 599, 800 P.2d 359 (1990), any conclusions of law supporting such action are reviewed *de novo*. *Id.* at 600. In particular, issues of constitutional law are reviewed *de novo*. *Spokane Cty.*

²⁶ For example, a municipality is able to raise the rights of its citizens. *City of Seattle v. State*, 103 Wn.2d 663, 669, 694 P.2d 641 (1985). Such representational-type standing does not aid the Suburban Cities here as neither their citizens nor their employees' substantive rights are impacted by the inquest.

v. State, 469 P.3d 1173, 1176 (Wash. 2020). Here, the trial court issued a decision akin to an order on summary judgment, where the court considered only declarations and legal briefs without taking any testimony or judging credibility. Such rulings are subject to *de novo* review. *Killian v. Seattle Pub. Sch.*, 189 Wn.2d 447, 453, 403 P.3d 58 (2017). In short, because this court sits in the same position as the trial court considering legal issues and a paper record, the rulings in the Injunction and Order are subject to *de novo* review. See *Washington State Hosp. Ass'n v. Washington State Dep't of Health*, 183 Wn.2d 590, 595, 353 P.3d 1285 (2015) (Review is *de novo* when “this court sits in the same position as the superior court.”).

B. THE EXECUTIVE’S AUTHORITY TO PROMULGATE EXECUTIVE ORDERS FOR INQUESTS DERIVES FROM CHARTER, STATUTE AND ORDINANCE

In striking down the 2020 EO, the trial court fundamentally misunderstood the nature and source of the authority exercised by the Executive. Rather than establishing substantive law, the 2020 EO merely provides the Executive’s procedural direction on how inquests are to be carried out by executive branch authorities. Although the 2020 EO continues to advance the role of inquests in examining and understanding deaths caused by police actions, many of the provisions that respondents complain about in the 2020 EO were features of King County inquests

dating back to at least 1985. Over time, the inquest process has changed incrementally while the willingness of Police Parties to engage in a transparent and comprehensive inquest has apparently changed much.

The trial court clearly disagreed with many of the policy choices underlying the 2020 EO procedures, but these policy choices are the prerogative of the Executive. The full authority of the Coroner's Statute, chapter 36.24 RCW, is "expressly vested" in the Executive under Charter § 320.20. Moreover, the Executive is granted additional authority to hold inquest proceedings in K.C.C. § 2.35A.090. As a home rule charter county, King County is permitted to legislate on matters of particular local concern, including inquests into local deaths cause by local law enforcement. The trial court, in ruling that King County inquests could not exceed the Coroner's Statute, failed to account for King County's home rule authority. For these reasons, the trial court's decision to strike down Charter § 320.20 and invalidate the 2020 EO must be reversed.

1. **Through Operation of the King County Charter, the Executive Wields The Full Authority of the Coroner's Statute In Conducting Inquest Proceedings.**

Rather than split the executive function among various office holders like a county coroner, the King County Charter establishes a strong executive form of government. By charter, King County has no coroner. Instead, absent an allocation by the County Council, the Charter

vests functions of offices like the county coroner in the Executive, who “shall be the chief executive officer of the county and *shall have all the executive powers of the county which are not expressly vested in other specific elective officers by this charter.*” Charter § 320.20 (emphasis added). In essence, this provision grants the Executive residual and implied executive powers sufficient to carry out various functions contained in state law. As a check against the broad grant of executive power in Charter § 320.20, the County Council has the authority under Charter § 220.20 to establish executive and other agencies where there is a need for enhanced administrative structure. The County Council also has general legislative authority and the power of the purse.

a. The Trial Court’s Invalidation of Charter § 320.20 Was Highly Irregular.

The trial court determined that Charter § 320.20 violated Article XI, § 4 without the benefit of any briefing or argument expressly addressed to this important topic. The claim that Charter § 320.20 violated Article XI, § 4 was not raised until the submission of a proposed order by the Police Parties – long after briefing and argument were closed. In adopting this position, the trial court failed to consider the strict standards applicable to declaring a Charter provision unconstitutional and adopted an interpretation of Article XI, § 4 that is inconsistent with the

both the purpose and language of this section of our constitution.

It is well established that laws are presumed constitutional and may be declared unconstitutional only if the court so determines beyond a reasonable doubt: “Our traditional articulation of the standard of review in a case where the constitutionality of a statute is challenged is that a statute is presumed to be constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt.” *Island Cty. v. State*, 135 Wn.2d 141, 146, 955 P.2d 377, 380 (1998). At the very least, this standard “refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution.” *Id.* at 147. A party challenging the constitutionality of a statute “bears a heavy burden.” *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762, 780 (2000). These same rules apply to charter provisions. *See State v. Rabon*, 45 Wn. App. 832, 834, 727 P.2d 995, 996 (1986) (considering constitutional challenge to city charter).

Here, the inclusion of an issue only in a proposed order following briefing and argument fails to provide the “argument and research” necessary to declare Charter § 320.20 unconstitutional. Nothing in the trial court’s order affords a presumption of constitutionality or finds that the “beyond a reasonable doubt” standard has been satisfied. These

prudential limitations enforce the comity owed when evaluating the constitutionality of charter provisions. “[A] home rule charter is the organic law of a county, just as the constitution is for the State.” *Maleng v. King Cty. Corr. Guild*, 150 Wn.2d 325, 331, 76 P.3d 727, 729 (2003). Because the trial court’s decision to declare Charter § 320.20 in violation of Article XI, § 4 fails to meet these important standards, it must be reversed.

b. Charter § 320.20 Does Not Violate Article XI, § 4.

The trial court’s determination that that Article XI, § 4 precludes placing residual and implied executive powers in a strong county executive is both incorrect and contrary to the purposes of Article XI, § 4. The charter government language in Article XI, § 4 was adopted as Amendment 21 to our state constitution by state voters in 1948 in order to provide counties with the same flexibility of home rule government previously allowed to cities. Washington cities had long explored many types of possible government structures. *See State ex rel. Linn v. Superior Court for King Cty.*, 20 Wn.2d 138, 144, 146 P.2d 543 (1944). Just prior to the adoption of Amendment 21, the Supreme Court noted that “[t]he constitution nowise limits the form city charters shall take, nor the particular method of city government which may be established thereby,

so long as the charter conforms to general laws.” *Id.* at 145. Indeed, the trial court’s holding that Amendment 21 *limits* the authority of a county executive within a charter government runs contrary to the express purpose of Amendment 21, which is to grant counties the same flexibility long enjoyed by charter cities. This Court “observed that the power to frame its own organic law is conferred in broad terms upon the county adopting a charter.” *State ex rel. Carroll v. King Cty.*, 78 Wn.2d 452, 456, 474 P.2d 877 (1970). It makes no sense to construe a constitutional provision designed to grant flexible forms of local government in a manner that restricts those available forms.²⁷

Similar to the authority granted cities in Article XI, § 10, Amendment 21 grants that “[a]ny county may frame a ‘Home Rule’ charter for its own government subject to the Constitution and laws of this state.” With *specific listed* exceptions that do not apply here, the constitution allows the charter to “provide for such county officers as may be deemed necessary to carry out and perform all county functions as provided by charter or by general law, and for their compensation.” Amendment 21. In light of this language, it was error for the trial court to read Amendment 21 to limit the authority of the executive, especially

²⁷ A constitutional provision should be construed “so as to give effect to the manifest purpose” for which it was adopted. *Linn*, 20 Wn.2d at 143.

when strong mayor charters have allocated residual and implied executive powers to city mayors for a very long time. *See also King Cty. Water Districts*, 194 Wn.2d at 850 (Article XI, § 4 manifests Washingtonians “intent that they should have the right to conduct their purely local affairs without supervision by the state, so long as they abided by the provisions of the constitution and did not run counter to considerations of public policy of broad concern, expressed in general laws.”).

In light of the Amendment’s overall purpose, structure, and language, the trial court misunderstood the single sentence that it relied upon for declaring Charter § 320.20 unconstitutional. The full provision reads:

After the adoption of such charter, such county shall continue to have all the rights, powers, privileges and benefits then possessed or thereafter conferred by general law. *All the powers, authority and duties granted to and imposed on county officers by general law, except the prosecuting attorney, the county superintendent of schools, the judges of the superior court and the justices of the peace, shall be vested in the legislative authority of the county unless expressly vested in specific officers by the charter.* The legislative authority may by resolution delegate any of its executive or administrative powers, authority or duties not expressly vested in specific officers by the charter, to any county officer or officers or county employee or employees.

(Emphasis added). The first sentence in this paragraph means that a charter county continues to have all the rights, powers and privileges afforded to counties in RCW Title 36. With the exception of several listed

county officers, the second sentence provides that all privileges and duties of other officers rest with the county council, *unless “expressly vested” in another county officer by the charter*. The final sentence preserves the ability of the county’s legislative body, consistent with its charter, to reallocate duties and obligations from RCW Title 36 to county officers.

The key to applying the second sentence in Article XI, § 4 to King County’s Charter, is that Charter § 320.20 represents an “express vesting” of all executive power in the executive. Consistent with the purposes of Amendment 21 and the authority previously enjoyed by cities, a county is free to adopt a strong county executive form of government by placing full executive powers with the Executive. The grant of residual and implied executive powers to the Executive in the Charter is exactly the kind of “express vesting” contemplated by Amendment 21. By this vesting, the Charter allocates all the powers and responsibilities contained in RCW Title 36. *See Linn, 20 Wn.2d at 143* (“The object of construction, as applied to a written constitution, is *to give effect to the intent of the people in adopting it.*”). This construction *preserves* the flexibility of local forms of government that may be adopted under a charter rather than impeding it. It is the correct and reasonable construction of Amendment 21.

The trial court’s determination that Article XI, § 4 precludes provisions in the King County Charter that delegate authority to the

County Executive to conduct inquests *is directly foreclosed by this Court's express holding in Carrick v. Locke, 125 Wn.2d 129, 141, 882 P.2d 173 (1994)*. In *Carrick*, this Court considered an earlier executive order (PHL 7-1 (AEP)) with many provisions similar to the 2020 EO. This court found that the EO presented no constitutional problems under Article XI, § 4:

The remainder of this constitutional provision simply provides that all responsibilities placed on county officials by general statutes will accrue to the county legislative authority in a home rule county. Those responsibilities may be delegated, either by the county charter or by ordinance, to “any county officer or officers or county employee or employees”. This is *exactly* what King County has done. It has broken up the responsibilities of the coroner, as described in the general law of RCW Chapter 36.24, assigning most of the coroner's duties to the division of the medical examiner, but retaining the authority to conduct inquests in the County Executive. *Such a division of labor is precisely what is contemplated and permitted by Const. art. 11, § 4. There is no constitutional prohibition on such an innovative distribution.*

Carrick, 125 Wn.2d at 141 (emphasis added).

The trial court relied on *Durocher v. King Cty.*, 80 Wn.2d 139, 492 P.2d 547 (1972) for the notion that Article XI, § 4 requires any delegations to the County Executive to be “specific, not general,” but *Durocher* stands for no such proposition. CP 2386. Importantly, the trial court’s “specific, not general” construct appears nowhere in the *Durocher* opinion. There is nothing in the case holding that the express delegation to the County Executive in Charter § 320.20 of “all the executive powers of the county

which are not expressly vested in other specific elective officers by this charter” is too general and nonspecific. Indeed, the *Durocher* decision does not control because Charter § 320.20 is not addressed in that decision.²⁸ Picking and choosing isolated statements from an appellate opinion cannot create a holding on a charter provision that was not before the court. *See Lakehaven Water & Sewer Dist. v. City of Fed. Way*, 195 Wn.2d 742, 763 n.10, 466 P.3d 213 (2020) (“Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis.”).

Because Charter § 320.20 granted the unallocated authority of the coroner to the Executive, the full inquest powers of the coroner under the Coroner’s Statute reside with the Executive. The trial court’s decision to

²⁸ The unique issue in *Durocher* was how to process an “unclassified use permit,” which this Court surmised was inadvertently left out of King County’s original 1968 charter. *Durocher*, 80 Wn.2d at 148 n.6. Prior to adoption of the charter, such an application would have been made to the planning commission with a right of appeal to the board of county commissioners. *Id.* at 146. But adoption of the 1968 charter abolished both the planning commission and the board of county commissioners, while allocating other zoning and development functions to the department of planning and the county council. *Id.* at 147. This error in the 1968 charter created the “anomalous situation” of repealing the procedural provisions, but retaining substantive provisions for unclassified use permits. *Id.* In this odd situation, *Durocher* stands only for the proposition that administering unclassified use permits “remains with the county council” because the 1968 charter made no allocation of a function previously exercised by the pre-charter legislative authority. *Id.* at 150-51.

declare this Charter section unconstitutional, thereby depriving King County residents of their preference for a strong executive form of government, should be reversed.

2. **The County Executive Derives Additional Inquest Authority From King County’s Home Rule Charter and Ordinances.**

In addition to the statutory powers of the Coroner’s Statute, the County Executive also derives authority from King County’s home rule ordinances. Charter counties have legislative powers as broad as the state’s, except when expressly restricted by state law. *See King Cty. Council v. Pub. Disclosure Comm’n*, 93 Wn.2d 559, 562-63, 611 P.2d 1227 (1980); *Sw. Wash. Chapter, Nat’l Elec. Contractors Ass’n v. Pierce Cty.*, 100 Wn.2d 109, 123, 667 P.2d 1092 (1983). “[A] home rule charter county has ‘the right to conduct their purely local affairs without supervision by the state, so long as they abide[] by the provisions of the constitution and d[o] not run counter to considerations of public policy of broad concern, expressed in general laws.’” *Carlson v. San Juan Cty.*, 183 Wn. App. 354, 368, 333 P.3d 511 (2014) (quoting *State ex rel. Carroll v. King Cty.*, 78 Wn.2d 452, 457-58, 474 P.2d 877 (1970)). Because inquests into law enforcement related deaths implicate matters of substantial local concern, ample home rule authority exists to legislate in this area. *See, e.g., King Cty. v. King Cty. Water Dists. Nos. 20 et al.*, 194

Wn.2d 830, 846, 453 P.3d 681 (2019) (“When it comes to local affairs, King County may legislate as it sees fit—within the confines of state and constitutional law, of course.”). Importantly, in adopting its charter, King County “reserved for itself as much power as the constitution permits.” *Id.* at 850. *See also* Charter § 110 (“The county shall have all of the powers which it is possible for a home rule county to have under the state constitution.”).

King County has long allocated the inquest functions of the coroner to the County Executive and assigned the remaining coroner functions to the county medical examiner. *See Miranda v. Sims*, 98 Wn. App. at 900-01 (“Under the King County Code, the County Executive has the authority to conduct inquests.”); *In re Boston*, 112 Wn. App. at 117-18 (same). Under K.C.C. § 2.35A.090(C), the “chief medical examiner shall institute procedures and policies to ensure investigation into the deaths of persons so specified in chapter 68.50 RCW and to ensure the public health, *except for the holding of inquests, which function is vested in the county executive.*” (Emphasis added). *See also* K.C.C. § 2.35A.090(B).

The Executives authority over inquest proceedings was recently confirmed in Ordinance 18652, which became law in February 2018.²⁹ Legislative findings in Ordinance 18652 recognized that “the function of

²⁹ A copy of this ordinance is attached as Appendix C.

holding inquests is vested in the executive.” *Id.* at § 1(F). Further, the Council noted the long-time practice by county executives of adopting executive orders “establishing policies and procedures for the inquest process.” *Id.* at § 1(G). It was the Council’s determination that families of decedents needed legal representation to “assist them in understanding the inquest proceedings” so that they might be able to “fully participate in the inquest process, including participating in the preinquest hearings, engaging in discovery or examining witnesses at the inquest, including law enforcement personnel.” *Id.* at § 1(H). Toward this purpose, the Council mandated the provision of counsel for families who were engaged in the inquest process. K.C.C. § 2.60.052.

In rejecting the 2020 EO, the trial court miscited *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 812, 6 P.3d 30 (2000) for the overly broad proposition that a county executive cannot promulgate executive orders that carry the force of law, but this citation both ignores the context of *Fischer-McRenolds* and misstates the purpose of the 2020 EO. In *Fischer-McRenolds*, plaintiff claimed that an executive order issued by the Governor established a cause of action allowing her recovery. The Court of Appeals rejected such an interpretation of the Governor’s executive order because no legislative power rests in the executive to create causes of action. *See also Sofie v. Fibreboard Corp.*,

112 Wn.2d 636, 666, 771 P.2d 711, 727 (1989) (It is the “Legislature's power to define parameters of a cause of action and prescribe factors to take into consideration in determining liability.”).

But any citation to *Fischer-McReynolds* is inapposite because the 2020 EO does not create a cause of action. Instead, it states the Executive’s policy of conducting transparent and comprehensive inquests, and establishes the procedures for an executive branch employee – the Inquest Administrator – to follow when carrying out such inquests in the name of the Executive. CP 1520-21. These purposes are well within the executive branch’s power. *See Fischer-McRenolds*, 101 Wn. App. at 813 (Recognizing that executive branch may issue by executive order “General Policy Statements” and “Directives, which serve to communicate to state agencies what the Governor would like them to accomplish.”).

The record is undisputed that King County has been conducting inquests pursuant to Charter, ordinance and executive order since at least 1985. CP 1435. The 2020 EO continues this practice. The County Executive’s inquest role is supported by at least two home rule ordinances. The personnel required for the 2018-2020 EOs, including the Inquest Administrator, inquest manager and *pro tem* attorney, have been fully funded by the King County Council. CP 1445. The trial court’s failure to recognize King County’s home rule authority for the inquest process

described in the 2020 EO was error.

3. **The 2020 Executive Order, Which Establishes the Procedures for Conducting Inquests is Within the Proper Authority of the County Executive.**

The 2020 EO establishes inquest procedures and designates executive branch employees to conduct the inquest. This is not the first time that inquest procedures issued by the County Executive have been challenged. In *Carrick*, 125 Wn.2d at 145, this Court held that such orders “did not exceed the King County Executive’s authority under the King County Charter,” and that “differences between the Executive Order and RCW Chapter 36.24” did not violate the Washington Constitution, including Article XI, § 4. By itself, this holding is enough to reverse the trial court.

The fundamental nature of the proceedings reviewed then remains unchanged today. Coroner inquests are publicly held fact-finding proceedings into the circumstances surrounding a death. Per state statute, the Charter and the King County Code, the Executive is charged with the responsibility of holding inquest proceedings to review the facts regarding “who died, what was the cause of death, and what were the circumstances surrounding the death.” *Carrick*, 125 Wn.2d at 133; chapter 36.24 RCW; K.C.C. § 2.35A.050, 090(B), (C). An impartial panel drawn from the community’s jury pool makes factual findings, but the proceeding results

in no binding determinations of criminal guilt or civil responsibility, which is the province of the judicial branch. *Id.*

The decision of the County Executive to specify procedures for inquests conducted in his name is unremarkable. The County Executive is the chief executive officer of the county. Charter § 320.20. The Executive's duties include supervisions of county administrative functions and the power to assign duties to administrative offices and executive departments. *Id.* As a general matter, executive orders are a reasonable way to fulfill these important Charter obligations.

Contrary to the decision of the trial court, this Court has already rejected any need for complete conformity between the 2020 EO and the coroner's statute. An executive order is permitted to exceed the requirements of the Coroner's Statute:

The conflicts alleged by Respondents involve gaps in the statute which are specifically dealt with by the Executive Order, and so do not create any direct conflict. In some cases, activities that the statute permits are made mandatory by the Executive Order. *Compare* RCW 36.24.020 (prosecutor may be present at inquest and assist coroner) *with* Executive Order PHL 7-1 (AEP) app. 9.1, at 2 (prosecutor shall participate in inquest). In other cases, the district court judge is given responsibilities beyond those outlined in RCW Chapter 36.24, but these extra duties do not contravene or render nugatory the duties outlined in that chapter. *Compare* RCW 36.24.070-.110 (if jury finds murder or manslaughter committed, coroner must issue arrest warrant for persons not in custody, or deliver the jury's verdict, along with the witnesses' statements, to the charging magistrate in the case of a person already in custody) *with* Executive Order PHL 7-1 (AEP)

app. 9.1, at 17 (district court judge to deliver jury's findings to King County Executive). *Clearly, when the statute and the executive order contain different, but not conflicting, requirements, the person conducting the inquest must comply with both requirements. . . . We do not find any direct and irreconcilable conflict between the statute and the executive order.*

Carrick, 125 Wn.2d at 144 (emphasis added). This Court ultimately approved of King County's "innovative" approach to inquest proceedings. *Id.* at 141.

In light of *Carrick* and the long history of King County inquests pursuant to executive order, there is no merit to the trial court's determination that the Executive lacks authority to conduct inquests, or is limited by the provisions of the Coroner's Statute. Through the Coroner's Statute and its home rule authority, King County is able to adopt an inquest process by executive order that meets its local needs.

C. THE AUTHORITY TO HOLD AN INQUEST HEARING INCLUDES THE AUTHORITY TO FACILITATE PRE-HEARING DISCOVERY THROUGH ISSUANCE OF SUBPEONAS

The trial court not only limited King County inquests to an overly narrow reading of the Coroner's Statute, but also eliminated the ability of the parties and the *pro tem* attorney to prepare for that hearing through regular discovery. Such discovery has been taking place in King County inquests since at least 1985. CP 1453. Because the Coroner's Statute

specifically authorizes pre-hearing subpoenas, and because preparation for an inquest hearing through discovery is a necessary adjunct to the hearing itself, the trial court erred.

As recently amended, the Coroner's Statute explicitly authorizes the issuance of subpoenas prior to the inquest hearing:

In addition to any of its existing authorities, the coroner may, in the course of an active or ongoing death investigation, request that the superior court issue subpoenas for production of documents or other records and command each person to whom the subpoena is directed to produce and permit inspection and copying of documentary evidence or tangible things in the possession, custody, or control of that person at a specified time and place. A subpoena for production must substantively comply with the requirements of CR 45. A subpoena for production may be joined with a subpoena for testimony, or it may be issued separately.

RCW 36.24.200. Because this is a plain language statute granting the coroner the right to issue subpoenas, it is not subject to statutory construction. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (“When the plain language is unambiguous—that is, when the statutory language admits of only one meaning—the legislative intent is apparent, and we will not construe the statute otherwise.”); *Harris v. State, Dep't of Labor & Indus.*, 120 Wn.2d 461, 472 n.7, 843 P.2d 1056 (1993) (It is a “fundamental principle of statutory construction” that this Court “will not construe unambiguous language in a statute.”).

Without identifying any ambiguity in this statute, the trial court

nonetheless gave it a narrowing construction where it could only be used by the medical examiner. The court based this narrowing construction on the likelihood that RCW 36.24.200 was adopted in response to *BNSF Ry. Co. v. Clark*, 192 Wn.2d 832, 834, 434 P.3d 50 (2019), where this court determined that the former version of the Coroner’s Statute did not allow the issuance of subpoenas prior to the inquest hearing. However, the relevant inquiry for a court interpreting plain language is not *why* the Legislature acted, but simply what does the plain language mean.

Here, there is nothing in RCW 36.24.200 limiting its use to the medical examiner’s exercise of coroner functions versus the Executive’s exercise of coroner functions. The statute allows for pre-inquest hearing subpoenas “in addition to” any of the coroner’s existing authorities. The only caveat is that the subpoena must be issued “in the course of an active or ongoing death investigation.” Both the medical examiner and the Executive as inquest coroner are part of such an investigation, which remains open through the conclusion of the inquest. An inquest is, by its very nature, a death investigation. *Carrick*, 125 Wn.2d at 136-8. Because RCW 36.24.200 expressly authorizes pre-hearing subpoenas for “production of documents or other records” and “for testimony,” the pre-hearing discovery provisions of the 2020 EO fall within the Executive’s authority.

A separate source of authority to require compliance with prehearing discovery is King County’s home rule authority. The Executive is authorized to conduct inquest hearings. Such authorization necessarily carries with it the ability to prepare for that hearing, including discovery on relevant matters similar to what is allowed under CR 26. Although inquests are nonbinding, the Executive reasonably allows discovery to prevent parties from being ambushed or unprepared. In fact, the County Council in K.C.C 2.60.052, expressly recognized that “[t]he inquest process is a formal legal proceeding, involving **discovery of evidence** and examining of witnesses, including law enforcement personnel and experts.” (emphasis added).³⁰ Thus, under both the Coroner’s Statute and home rule powers, the Executive has the authority to allow reasonable discovery in connection with inquest hearings.³¹

³⁰ The signature report of the ordinance also includes the Council’s findings for the ordinance. Those findings include: “E. The inquest process serves the public function of fact finding related to a death and involves formal legal proceedings, **discovery** and examination of persons, including law enforcement personnel and expert witnesses.” Ord. 18652 § 2, 2018 (emphasis added).

³¹ A review of the briefing submitted in *Carrick* (on file with the Court) reveals that Plaintiffs Carrick and Elston specifically challenged the 1990 EO’s provision providing for the exchange of pre-hearing discovery in that case. See Brief of Respondent Don Carrick, 61542-0, pages 32-35; see also Reply Brief of Appellant Locke et al, 61542-0, pages 18-20. As such this Court has already affirmed that an EO on inquests may provide for pre-hearing discovery. *Carrick*, 125 Wn.2d at 143-44. Compare CP 1462 and 1508-09.

D. THE TRIAL COURT ERRED BY HOLDING THAT INVOLVED OFFICERS ENJOY A BLANKET PRIVILEGE AGAINST TESTIFYING AT INQUEST PROCEEDINGS UNDER THE FIFTH AND SIXTH AMENDMENTS

Contrary to established precedent, the trial court's injunction grants officers blanket immunity against testifying at inquest proceedings through a misapplication of the Fifth and Sixth Amendments. CP 2400-1, 2405 (Injunction at 20-21, 25). Because inquests are not criminal proceedings where the officer is placed in jeopardy of a criminal conviction, there is no blanket testimonial privilege. *See Stone v. State*, 85 Wn.2d 342, 345, 534 P.2d 1022 (1975) (Any subsequent criminal matter that may address the underlying facts of the inquest is "completely separate and distinct" from the inquest itself.). Instead, just like any other person, an officer is required to answer questions under oath. *See Trump v. Vance*, __ U.S. __, 140 S. Ct. 2412, 2420 (2020) ("[T]he public has a right to every man's evidence"). Just like anyone, an officer enjoys a Fifth Amendment right against self-incrimination. However, when providing testimony in non-criminal proceedings, the Fifth Amendment must be asserted on a question-by-question basis and provides no blanket privilege against testimony. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 352 n.20, 16 P.3d 45 (2000).

Likewise, the Sixth Amendment supplies no blanket privilege

against testifying in inquest proceedings. It is well-established that “the Sixth Amendment right to effective assistance of counsel only applies to criminal proceedings, and no similar right is given to parties in civil actions.” *Willapa Trading Co., Inc. v. Muscanto, Inc.*, 45 Wn. App. 779, 785, 727 P.2d 687 (1986). By its own language, the Sixth Amendment is limited in application to “criminal prosecutions.” *See also In re Det. of Strand*, 167 Wn.2d 180, 191, 217 P.3d 1159 (2009) (Fifth and Sixth Amendments to the federal constitution do not attach to SVP petitioners because SVP proceedings are civil and not criminal matters.). Thus, the trial court’s creation of a blanket testimonial privilege for the exclusive use of law enforcement at inquest proceedings was plain error.

E. THE EXECUTIVE HAS THE AUTHORITY TO DETERMINE THE SCOPE OF THE INQUEST

1. Provisions of the 2020 EO Defining the Consideration of Policy and Training at the Inquest Fall Well Within the Executive’s Authority.

As noted above, the impact of policy and training on a law enforcement-involved death has been a discretionary part of King County inquests since at least 1985. CP 1454. In the 2020 EO, the Executive makes consideration of policy and training mandatory for every inquest – both to inform the circumstances of the death and to identify practices that might prevent future deaths. After all, training and policies are essential

tools in the toolkit that officers bring to every encounter with members of the public. They are no less important than the physical tools (e.g. gun, TASER, handcuffs, radio, body camera) that officers carry.

The trial court's determination that consideration of policy and training somehow exceeds the scope of the Coroner's Statute is perhaps the best example of where the lower court improperly substituted its judgment for that of the Executive. The trial court points to no language in the Coroner's Statute that would preclude consideration of policy and training. To the contrary, in *Carrick*, this Court recognized that the purpose of an inquest is to examine all the "facts and circumstances of the death." There is no logical argument that excludes an officer's policy and training from the facts or circumstances that resulted in the death, especially when policy and training serve to inform an officer's response to potential threats.³² The trial court's interpretation of some unidentified language in the Coroner's Statute to preclude consideration of policy and training operates only to thwart the purposes of the inquest function, which is to determine how and why a death occurred. *See Fraternal*

³² To the extent that the trial court perceived some unidentified ambiguity in the Coroner's Statute, it failed to defer to the Executive's interpretation of the statute, which is appropriate because the Executive is charged with administration of the statute and it falls within his expertise. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007).

Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles, 148 Wn.2d 224, 239, 59 P.3d 655 (2002) (“In interpreting a statute, the primary objective of the court is to ascertain and carry out the intent and purpose of the Legislature in creating it.”).

Furthermore, the trial court’s exclusive focus on the Coroner’s Statute ignored the impact of Charter provisions and ordinances that also support the Executive’s inquest authority. The trial court erred by overlooking this supplemental source of authority for the 2020 EO, as well as this Court’s determination in *Carrick* that both the Coroner’s Statute and the executive order properly combine to define the inquest process. 125 Wn.2d at 144 (“Clearly, when the statute and the executive order contain different, but not conflicting, requirements, the person conducting the inquest must comply with both requirements.”).

Finally, the trial court found it unfair that the 2020 EO did not allow a police chief to testify whether an officer complied with policy and training. The Executive, however, may reasonably conclude that the police chief’s testimony on this issue would not be helpful due to inherent bias and the undue weight it might hold with the jury.³³ Such a

³³ This would be the case in both the scenario where the police chief believed that an officer complied with policy and training (for example Officer Jeffrey Nelson was internally cleared by his department for killing civilian Jesse Sarey and yet has since been charged with murder), or where

determination is within the Executive's policy prerogative in adopting inquest procedures. Moreover, the trial court is incorrect that other witnesses, including experts, would be precluded from providing testimony on policy and training issues.³⁴ The 2020 EO leaves it to the discretion of the Inquest Administrator to determine what testimony might be helpful to the inquest jury.

2. The Trial Court Erred By Limiting the Discretion of the Inquest Administrator To Determine Admissible Evidence, Including Expert Testimony.

Despite the holding from *In re Boston* that superior courts have no jurisdiction to review inquest proceedings, 112 Wn. App. at 118, the trial court issued a broad injunction mandating what evidence and testimony is admissible:

The Executive and the County are hereby enjoined from allowing evidence or submitting interrogatories to the inquest jury that pertain in any way to fault or civil or criminal liability. This includes, but is not limited to, testimony or evidence from outside expert witnesses who were not involved in the underlying law enforcement investigation into the death.

the police chief testified to noncompliance (because an officer has since been fired or otherwise disciplined by the agency).

³⁴ The EO's only statement regarding experts is that it permits the participants to "proffer [their] own witnesses to provide testimony that aids the panel in the understanding of the facts, including factual areas of experts (e.g. ballistics and forensic medical examination)." CP 1571 (EO App. 2 § 12.1). Thus, the EO does not bar any participant from proffering an expert witness to opine on compliance with training and policy but leaves the ultimate decision of witnesses to the discretion of the Inquest Administrator in compliance with RCW 36.24.050.

CP 2404. The trial court entered this injunction even though there were no specific evidentiary rulings by Inquest Administrator before the court. Although the 2020 EO does not allow evidence or interrogatories that directly address questions of fault, civil or criminal liability, the issue of what evidence might violate such a standard is necessarily left to the discretion of the Inquest Administrator per the terms of the 2020 EO. Per *In re Boston*, such evidentiary questions are not properly subject to the trial court's premature and prophylactic injunction.

Putting aside the legal problems of jurisdiction and ripeness, the practical problem with the trial court's injunction is that almost all evidence that addresses a death "pertains" to fault, civil liability or criminal liability. For example, even evidence on the trajectory of a bullet or the position of a person's body when shot may pertain to liability. But the distinction in the 2020 EO is between evidence with relevance to the facts and circumstances of death versus testimony on ultimate questions of criminal or civil liability. In accord with the 2020 EO, the dividing line between admissible evidence and inadmissible testimony on an ultimate issue of civil or criminal liability is properly left for the Inquest Administrator to decide.

Because the trial court lacks jurisdiction to review any evidentiary

rulings arising from an inquest, much less evidentiary rulings that have not yet occurred, it cannot have jurisdiction to foreclose entire lines of questioning that might “pertain” to another proceeding down the road. In short, the Executive has adopted a reasonable process for dealing with admissibility questions and the trial court lacks authority to override the Executive’s judgment, or the discretionary decisions of the Inquest Administrator (once such decisions are actually made).

3. The Executive Acted Within His Authority By Limiting The Inquest Jury From Making Determinations Based on the Officer’s Subjective State of Mind.

The trial court erred by enjoining the County from imposing restrictions on the inquest jury issuing conclusions regarding whether the involved officer subjectively thought the decedent posed a threat. The trial court provides no reasoning why the restriction contained in 2020 EO §14.2 impermissibly conflicts with state law. Further, in reaching this conclusion, the court incorrectly assumed that the 2020 EO forbids testimony on this subject. The 2020 EO permits the Inquest Administrator to allow an involved officer (or other officer witnesses) to testify regarding how they felt at the time of the incident and whether or not they were in fear. The EO only precludes the jury from answering questions that would indicate whether or not they endorse the officer’s subjective

feelings.³⁵

Instead of determining how an officer felt, the inquest jury is permitted to conclude via interrogatories, whether the facts show that the decedent, objectively, posed a danger to the officer or others. Because an inquest's purpose is to determine the "why" (and the who, what, where, and when) of a death, an objective determination of the facts (rather than a subjective credibility determination on the officer's emotional state) is the appropriate determination for a jury to review the actions of a law enforcement officer's use of force. There is no legal basis for precluding the Executive's decision to define the scope of the inquest inquiry in this manner.³⁶

F. EVEN IF THE APPEARANCE OF FAIRNESS DOCTRINE APPLIES TO NONADJUDICORY PROCEEDINGS, THE 2020 EO DOES NOT VIOLATE IT.

³⁵ 2020 EO App. 2 § 14.2 states in relevant part, "The administrator shall instruct the panel that it may not comment on fault, or on justification-including the mental state of the involved officer(s), such as whether the officer thought the decedent posed a threat of death or serious bodily injury to the officer(s)-or on the criminal or civil liability of a person or agency."

³⁶ Notably, the trial court's rulings are internally inconsistent as the court's order on the one hand holds that the inquest jury cannot be asked **any** questions that may bear on criminal or civil liability and on the other hand must be asked whether the officer was in reasonable fear. The County's position has consistently been that the inquest jury should be asked to determine objective facts (like whether a reasonable person would have been in fear and whether an officer's actions were in line with agency policy) but not opine on ultimate issues of criminal or civil liability.

As argued above, the appearance of fairness doctrine has no proper application to an executive branch coroner's inquest. Regardless, the 2020 EO does not violate it.

1. **The Inquest Administrator System Does Not Violate the Appearance of Fairness Doctrine.**

Because the District Court judges declined to participate in inquest proceedings, the 2020 EO establishes an Inquest Administrator as the presiding officer. Inquest Administrator Spearman (and the other administrators) are well-respected retired judicial officers. There was no evidence presented below that the Inquest Administrators or the Executive held any bias or animus against any participant in the inquest.

Nevertheless, the trial court determined that the inquest administrator system violated the appearance of fairness doctrine because the administrators are at will employees of the Executive. The lower court's reasoning makes no sense. First, the inquest power is vested wholly in the Executive. Because the Executive can preside directly over inquest hearings, there is nothing inherently unfair about him designating an employee to function for him under procedures determined by executive order.³⁷ Second, because no law enforcement officers are

³⁷ Even if judges had continued to preside over inquests, they likewise would have been bound to follow executive orders on inquests. *Carrick*, 125 Wn.2d at 144 (“[W]hen the statute and the executive order contain

currently under the Executive's direct supervision (especially given the Sheriff's status as a separately elected office), the fact that the inquest administrator works for the Executive raises no conflict of interest. Even if this were the case, there would be no conflict whatsoever for inquests involving officers that work for other municipalities.

The Police Parties next claim that Executive amendments to the inquest executive orders somehow violate the appearance of fairness doctrine. The mere fact that the Executive may amend inquest procedures to better reflect his policy choices is not inherently unfair. In fact, King County Executives have issued at least ten different executive orders on inquests (1985, 1990, 1991 amendment, September 2001, October 2001, 2002, 2010, 2018, 2019, 2020). CP 1448-1526, 1561-1573. Neither the families, nor law enforcement are forced to participate as parties in the inquest proceeding. Their participation with party status is both permitted by the 2020 EO and conditioned by it. Because the purpose of the inquest is "to ensure a full, fair, and transparent review" of any law enforcement involved death, the Executive has the prerogative to amend executive orders toward this purpose. CP 1563, 1573.

different, but not conflicting, requirements, the person conducting the inquest must comply with both"). *See also In re Boston*, 112 Wn. App. at 120 (holding that judges who accept delegation of coroner authority are not acting in their judicial capacity and are instead acting as delegates of the Executive).

2. The 2020 EO Procedures are Fair.

In response to the Police Parties' concerns, the 2020 EO removed a provision from the 2019 EO that conditioned an officer's participation as a party at the inquest on his willingness to testify. Any challenge to the 2019 EO on this ground is moot. The Executive has no plans to re-adopt this provision.

G. THIS COURT SHOULD ADDRESS THREE CHALLENGES THAT MAY REMAIN IF THIS COURT REVERSES AND REMANDS

Assuming this Court reverses the trial court on all or some of the issues addressed above, there are three challenges made by the Police Parties that may remain on remand. These are the Police Parties claims on (1) whether the King County Charter permits the Executive to hold inquests involving law enforcement agencies other than the King County Sheriff's Office; (2) whether the inquests are timely under RCW 36.24.020; and (3) whether the inquests may be "live-streamed." Appellant asks this court to exercise its discretionary authority under RAP 12.2 to decide these issues because each claim involves "wholly a legal

question that would undoubtedly resurface on remand.” *Carrick*, 125 Wn.2d at 140.

1. The Executive’s Inquest Authority Extends Throughout the County.

The Police Parties argued below that the EO improperly permits inquests into deaths involving law enforcement agencies other than the King County Sheriff’s Office. The jurisdiction of the county, however, extends everywhere within the boundaries of the county. RCW 36.04.170 (describing jurisdictional boundaries of King County). Much like the prosecutor, clerk, assessor and many other county officers, the coroner is a county-wide official with dominion over the entire county. RCW 36.16.030. There is no provision in statute or constitution that allows cities to opt out of the King County’s coroner functions, including the inquest process. As a result, the Executive has acted completely within his discretionary authority under the Coroner’s Statute by requiring inquests for any law enforcement-involved death within the county. RCW 36.24.020 (“Any coroner, *in his or her discretion*, may conduct an inquest”) (emphasis added).

2. The Pending Inquests Are Not Barred By Any Statute of Limitations.

The Coroner’s Statute states that an “inquest shall take place within eighteen months of the coroner’s request to the court [to provide

persons to serve as a jury of inquest.]” RCW 36.24.020. The Police Parties alleged that this statute establishes a strict statute of limitations that precludes completion of five inquests (Butts, Lyles, Nelson, Obet, and Le), or any other inquest that outside the time period. There are two problems with this position.

First, although the Legislature commands the completion of inquests within 18 months, the statute nowhere indicates that failure to complete the inquest within this time frame somehow divests the coroner of authority. Such a reading would violate the purpose of the inquest proceeding, which is to determine the facts and circumstance of the death. Rather than a statute of limitations, this statute is more appropriately read within the category of statutes that encourage speedy resolution of cases. *See* RCW 2.08.240 (Superior Court judge “shall” decide every case submitted to her “within 90 days from the submission thereof.”); RCW 2.04.092 (Six-month requirement for Supreme Court opinions). Statutory provisions setting the time within which a public officer is to perform an act are directory unless the nature of the act or the language of the statute make clear that the designation of time limits the power of the officer. *See Niichel v. Lancaster*, 97 Wn.2d 620, 623, 647 P.2d 1021 (1982); *State v. Miller*, 32 Wn.2d 149, 201 P.2d 136 (1948). If a statute “is merely a guide for the conduct of business and for orderly procedure rather than a

limitation of power, it is directory.” *Sullivan v. Dep’t of Transp.*, 71 Wn. App. 317, 323, 858 P.2d 283 (1993). When the time for or manner of performing the authorized action is not essential to the purpose of the statute, the time and manner provisions are considered directory. *Niichel*, 97 Wn.2d at 624. A directory statute like this one is “not intended by the Legislature to be disregarded,” but serves only as “a guide . . . rather than a limitation of power.” *State v. Rice*, 174 Wn.2d 884, 896, 279 P.3d 849 (2012). As such, noncompliance with a directory statute “is attended with no consequences.” *Id.* at 895–96.

Second, there is no merit to the Police Parties’ position because *BNSF Ry. Co. v. Clark* makes it clear that an inquest does not commence until after the coroner requests jurors from the Superior Court. Because the Executive requested no jurors from the Superior Court prior to the Executive’s moratorium on inquests, the alleged 18-month time clock never began running.³⁸ Thus, the Police Parties’ statute of limitations theory must be rejected.

³⁸ The record shows that the challenged inquests (Butts, Lyles, Nelson, and Obet) “commenced” in 2019 when the Executive sent letters to Superior Court Presiding Judge James Rogers (excepting the Le matter where no letter has been sent). CP 1445-46, 1554- 60. They were then stayed pending this action.

3. The Executive has full authority to make inquest proceedings accessible to the public.

The Police Parties alleged below that video livestreaming of an inquest and subsequent upload to YouTube is an intrusive overreach by the Executive, but this is a solely a policy determination for the Executive. The 2020 EO § 9.0 directs that the proceeding must be audio recorded and made publicly accessible to the greatest extent possible in accordance with General Rule (GR) 16. Similarly, 2020 EO § 10.0 directs that the proceedings may be made available to the public and the media to the greatest extent possible. The Police Parties have cited no authority for the proposition that the Administrator may not make the proceeding, which is a matter of substantial public interest, immediately and publicly accessible on the web. Not surprisingly, they further failed to address the fact that the EO appropriately permits the Administrator to limit public access/filming/streaming in the same fashion that courts do pursuant to GR 16 and that they may make requests for such specific limitations.

Although the issue of livestreaming inquests has never been directly addressed in Washington, the Nevada Supreme Court specifically upheld Clark County's decision to allow live television broadcasting of an inquest proceeding finding that it did not violate the involved officer's due process rights. *Hernandez v. Bennett-Haron*, 128 Nev. 580, 588 fn. 4, 287

P.3d 305 (2012). The Nevada Court went one step further in explaining due process protections are not implicated because the inquests

serve a fact-finding and investigatory function because the proceedings do not result in an adjudication or determination of any of appellants' legal rights. The sole product of the inquest process are factual findings which, in and of themselves, are not binding or entitled to preclusive effect in any future proceeding.

Id. In short, the Police Parties lack any basis for preventing public consideration of inquest proceedings.³⁹

³⁹ The question before the court is the general authority of the Executive, through the actions of the Inquest Administrator, to make inquests open to the public. Beyond this general authority question, individual examples where a particular photo or video might invade the privacy of the decedent are not at issue. The Inquest Administrator has made no particular rulings on discrete pieces of evidence and those questions are not ripe. Moreover, the Police Parties lack standing to raise concerns that properly belong to the families of the decedent.

VII. CONCLUSION

For the foregoing reasons, King County respectfully requests that this court reverse the trial court's declaratory judgment, lift the injunction and reinstate the 2020 EO.

RESPECTFULLY SUBMITTED this 1ST day of October, 2020.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
SAMANTHA D. KANNER, WSBA #36943
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APPENDIX A

Select Constitutional Provisions, Statutes, and Ordinances

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Washington State Constitution, Article XI, Section 4 (paragraph 8)

After the adoption of such charter, such county shall continue to have all the rights, powers, privileges and benefits then possessed or thereafter conferred by general law. All the powers, authority and duties granted to and imposed on county officers by general law, except the prosecuting attorney, the county superintendent of schools, the judges of the superior court and the justices of the peace, shall be vested in the legislative authority of the county unless expressly vested in specific officers by the charter. The legislative authority may by resolution delegate any of its executive or administrative powers, authority or duties not expressly vested in specific officers by the charter, to any county officer or officers or county employee or employees.

RCW 36.24.050 Power to summon witnesses—Subpoenas.

The coroner may issue subpoenas for witnesses returnable forthwith or at such time and place as the coroner may appoint, which may be served by any competent person. The coroner must summon and examine as

witnesses, on oath administered by the coroner, every person, who, in his or her opinion or that of any of the jury, has any knowledge of the facts. A witness served with a subpoena may be compelled to attend and testify, or be punished by the coroner for disobedience, in like manner as upon a subpoena issued by a district judge.

RCW 36.24.200 Subpoena for production—Authority.

In addition to any of its existing authorities, the coroner may, in the course of an active or ongoing death investigation, request that the superior court issue subpoenas for production of documents or other records and command each person to whom the subpoena is directed to produce and permit inspection and copying of documentary evidence or tangible things in the possession, custody, or control of that person at a specified time and place. A subpoena for production must substantively comply with the requirements of CR 45. A subpoena for production may be joined with a subpoena for testimony, or it may be issued separately.

King County Charter § 220.20 Powers.

The county council shall be the policy determining body of the county and shall have all legislative powers of the county under this charter. The county council shall exercise its legislative power by the adoption and enactment of ordinances; shall levy taxes, appropriate revenue and adopt budgets for the county; shall establish the compensation to be paid to all county officers and employees and shall provide for the reimbursement of expenses; except as otherwise provided herein shall have the power to establish, abolish, combine and divide administrative offices and executive departments and to establish their powers and responsibilities; shall adopt by ordinance comprehensive plans including improvement plans for the present and future development of the county; shall have the power to conduct public hearings on matters of public concern to assist it in performing its legislative responsibilities and to subpoena witnesses, documents and other evidence and to administer oaths, but the subpoena power of the county council shall be limited to matters relating to proposed ordinances which are being considered by the county council, and any witness shall have the right to be represented by counsel. The specific statement of particular legislative powers shall not be construed as limiting the legislative powers of the county council.

King County Charter § 320.20 Powers and Duties.

The county executive shall be the chief executive officer of the county and shall have all the executive powers of the county which are not expressly vested in other specific elective officers by this charter; shall supervise all administrative offices and executive departments established by this charter or created by the county council; shall be the chief peace officer of the county and shall execute and enforce all ordinances and state statutes within the county; shall serve on all boards and commissions on which a county commissioner was required to serve prior to the adoption of this charter, but if more than one county commissioner was required to serve, the county council shall appoint one or more councilmembers to serve on the board or commission with the county executive; shall present to the county council an annual statement of the financial and governmental affairs of the county and any other report which the county executive may deem necessary; shall prepare and present to the county council budgets and a budget message setting forth the programs which the county executive proposes for the county during the next fiscal year; shall prepare and present to the county council comprehensive plans including capital improvement plans for the present and future development of the county; shall have the power to veto any ordinance adopted by the county council except as otherwise provided in this charter; shall have the power to assign duties to administrative offices and executive departments which are not specifically assigned by this charter or by ordinance; and shall sign, or cause to be signed, on behalf of the county all deeds, contracts and other instruments. The specific statement of particular executive powers shall not be construed as limiting the executive powers of the county executive.

King County Code § 2.35A.090 (B) and (C) (excepts)

B. The chief medical examiner shall assume jurisdiction over human remains, perform autopsies and perform such other functions as are authorized by chapter 68.50 RCW and such other statutes of the state of Washington as are applicable, except for the holding of inquests, which function is vested in the county executive. The chief medical examiner has the authorities granted under K.C.C. 2.35A.100.

C. The chief medical examiner shall institute procedures and policies to ensure investigation into the deaths of persons so specified in chapter 68.50 RCW and to ensure the public health, except for the holding of inquests, which function is vested in the county executive.

K.C.C. § 2.60.052 Provision of legal counsel to families of decedents for inquest process.

A. There is a public benefit in providing publicly financed legal counsel to families of the decedents wishing to fully participate in the inquest process. The inquest process is a formal legal proceeding, involving discovery of evidence and examining of witnesses, including law enforcement personnel and experts. Publicly financed legal counsel will allow all families to fully and equitably participate in the inquest process regardless of financial means. Inquests serve a public function of determining the cause and circumstances of any death involving a member of a law enforcement agency in the performance of the member's duties. The findings of an inquest help the public, family members of decedents and policy makers understand the causes and circumstances of the decedent's death. Public financing of legal counsel for all families of decedents will better ensure each party to an inquest will have equal opportunity to participate. Increasing such participation will bolster the transparency of the inquest process, thus furthering the recognized public function of an inquest. Therefore, the department shall provide legal representation at public expense to the family participating in an inquest, regardless of the income level of the members of the family, of the person whose death is the subject of an inquest investigating the causes and circumstances of death involving a member of any law enforcement agency within King County under Section 895 of the King County Charter or RCW 36.24.020. Representation shall not be provided if the family does not wish to be represented by the department's attorneys. The legal representation shall be limited to preparation for the inquest and participation during the inquest and shall not include any representation for the purpose of potential related civil litigation.

B. The executive shall revise any executive orders relating to inquests to reflect this section within one hundred twenty days of February 5, 2018.

C. For the purposes of this section:

1. "Family" refers to the group of those individuals determined by the person conducting the inquest to have a right to participate as the family of the decedent.

2. "A member of a law enforcement agency" means a commissioned officer or noncommissioned staff of a local or state police force, jail or corrections agency. (Ord. 18652 § 2, 2018)

APPENDIX B

Executive Order No. PHL-7-1-4-EO (“2020 EO”)

Document Code No.: PHL-7-1-4-EO

Department/Issuing Agency: County Executive Office

Effective Date: June 11, 2020

Approved: /s/ Dow Constantine

Type of Action: Supersedes PHL 7-1-3-EO, "Conducting Inquests in King County" December 4, 2019



King County

WHEREAS, Revised Code of Washington (RCW) Chapter 36.24 authorizes the county coroner to summon a jury to inquire into the death of a person by suspicious circumstances; and

WHEREAS, Section 895 of the King County Charter, as amended, provides that an inquest shall be held to find facts and review the circumstances of any death involving a member of the law enforcement agency of the county in the performance of the member's duties; and

WHEREAS, King County Code (KCC) Chapter 2.35A created a division of the medical examiner within the Seattle-King County Department of Public Health and assigned to it most of the coroner's duties under RCW Chapter 36.24, "except for the holding of inquests, which function is vested in the County Executive" under KCC 2.35A.090.B; and

WHEREAS, the County Executive, in exercising the authority to hold inquests, has discretion to determine how inquest proceedings are to be conducted, and to delegate the duty of presiding over an inquest to another impartial public official; and

WHEREAS, the County Executive retains the ultimate responsibility for the exercise of the inquest power and the performance of the delegated duty.

NOW, THEREFORE, I, Dow Constantine, King County Executive, do hereby order, direct, and implement the following policy and procedures for conducting an inquest, at Appendices 1 and 2.

Signed this 11th day of June 2020 at Seattle, Washington

Dow Constantine
King County Executive

Attest:

Norm Alberg

Director, Records and Licensing Services Division, Department of Executive Services

**Appendix 1 - Conducting Inquests in King County:
Conducting Inquests in King County**

1.0. SUBJECT TITLE

Conducting Inquests in King County.

2.0. PURPOSE

2.1. To establish policies and procedures for conducting reviews into the facts and circumstances of any death of an individual involving a member of any law enforcement agency within King County while in the performance of the member's duties [and/or exercise of the member's authority], and occasionally in other cases, as determined by the County Executive.

2.2. The purpose of the inquest is to ensure a full, fair, and transparent review of any such death, and to issue findings of fact regarding the facts and circumstances surrounding the death. The review will result in the issuance of findings regarding the cause and manner of death, and whether the law enforcement member acted pursuant to policy and training.

2.3. The purpose of the inquest is not to determine whether the law enforcement member acted in good faith or should be disciplined or otherwise held accountable, or to otherwise find fault, or to determine if the use of force was justified, or to determine civil or criminal liability. It is acknowledged that the facts determined in the course of the inquest may sometimes have an indirect bearing on such determinations.

3.0. ORGANIZATIONS AFFECTED

King County Department of Public Defense; King County Executive; King County Prosecuting Attorney; King County Superior Court; King County Medical Examiner's Office; King County Department of Executive Services; Law Enforcement agencies within King County.

4.0. REFERENCES

4.1. RCW 36.24 Counties; County Coroner.

4.2. King County Charter, Section 320.20 - The Executive Branch, Powers and Duties.

4.3. King County Charter, Section 895 - General Provisions: Mandatory Inquests.

4.4. King County Code 2.35A.090(B).

5.0. DEFINITIONS

5.1. "King County Executive" or "County Executive" means the official, or the designee of the official, who is elected and serves as the County Executive of King County pursuant to Article 3 of the King County Charter.

5.2. "King County Prosecuting Attorney" means the official, or the designee of the official, who is elected and serves as Prosecuting Attorney for King County pursuant to Article XI, Section 5 of the Washington State Constitution.

5.3. "Inquest" means an administrative, fact-finding inquiry into and review of the manner, facts and circumstances of the death of an individual involving a member of any law enforcement agency within King County while in the performance of his or her duties [and/or exercise of the member's authority], and occasionally in other cases, as determined by the County Executive, where death occurs in the custody of or in the course of contact with other non-law enforcement government agencies or employees.

5.4. "Law enforcement agency" means any agency having police powers as authorized under Washington State law. For the purposes of this policy, "a member of any law enforcement agency" shall mean commissioned officers and non-commissioned staff of all local and state police forces, jails, and corrections agencies.

5.5. "Attorney representing the family of the deceased" means a privately-retained or publicly funded attorney, pursuant to KC Ordinance 18652.

5.6. "Rules of Evidence" means the evidentiary rules adopted by the Supreme Court of the State of Washington governing proceedings in the courts of the State of Washington, and such rules as may be adopted by the King County Hearing Examiner pursuant to KCC 20.22.

5.7. "Voir dire" means an examination of a prospective panel as defined below.

5.8. "In camera review" means an examination of materials by the administrator in private proceedings to rule on admissibility and use.

5.9. "Panel" refers to the jury of inquest provided by Superior Court pursuant to RCW Chapter 36.24.

5.10. "Administrator" means the presider of the inquest proceeding, selected from a roster approved by the County Executive, who presides over a particular inquest proceeding.

5.11. "Manager" means the staff assigned to oversee the inquest program, to assign an administrator and pro tem attorney to a particular inquest, to provide clerical support to the administrator and pro tem attorney, and to report annually to the County Executive.

5.12. "Pro tem attorney" means the pro tem attorney assigned to assist the administrator and to facilitate an inquest.

6.0. POLICIES

6.1. There shall be an inquest into the manner, facts, and circumstances of any death of an individual involving a member of any law enforcement agency within King County while in the performance of his or her duties, [and/or exercise of the member's authority], and in any other case as occasionally determined by the County Executive where death occurs in the custody of or in the course of contact with other non-law enforcement government agencies or employees.

6.2. While the term "involving" is to be construed broadly, there may be circumstances in which law enforcement's role is so minimal as to not warrant an inquest, or where for other reasons an inquest would impede the administration of justice. Factors to be considered include: whether a decision to prosecute has been made; whether the death was the result of a condition existing prior to and/or apart from the law enforcement involvement; whether the individual was in custody at the time of the death; whether the family of the deceased desires an inquest; and any other factor that touches on the connection between the manner of death and the actions of law enforcement. However, the public has a strong interest in a full and transparent review of the circumstances surrounding the death of an individual involving law enforcement, so an inquest will ordinarily be held.

6.3. At the discretion of the County Executive, in exceptional circumstances there may be an inquest into the causes and circumstances of a death involving an individual in King County other than a member of a law enforcement agency.

7.0. RESPONSIBILITIES

7.1. 7.1. The King County Prosecuting Attorney shall inform the King County Executive whenever an investigation into a death involving a member of any law enforcement agency in King County is complete and also advise whether an inquest should be initiated pursuant to the King County Charter. If the King County Prosecuting Attorney advises that an inquest may be initiated, the King County Prosecuting Attorney and the pro tem staff attorney shall (a) supply a complete copy of the investigative file to the manager; (b) respond to public records requests for the investigative file; and (c) issue subpoenas to witnesses and/or for records at the administrator's request.

7.2. The King County Executive shall determine whether an inquest will be held. If an inquest is to be held, the Executive shall direct an administrator conduct the inquest on the Executive's behalf. The County Executive shall also request that the King County Superior Court facilitate the inquest by supplying (a) jury, which shall be referred to as a panel; and (b) appropriate facilities, including a courtroom, bailiff, reporter, and any necessary security. The inquest shall be conducted pursuant to this Executive Order and to RCW 36.24, as amended.

8.0. PROCEDURES

Action By: Prosecuting Attorney

8.1. Receives information from a law enforcement agency within King County of a death of an individual involving law enforcement that may require an inquest.

8.2. Promptly informs the County Executive of such a death.

8.3. Reviews the information and the investigative file and advises the County Executive as to whether an inquest should be held.

8.4. Upon request of the County Executive, forwards the investigative file to the manager.

8.5. Upon request by an administrator, issues subpoenas for witnesses and/or documents.

Action By: County Executive

8.6. Upon receiving the King County Prosecuting Attorney's advisory opinion, determine whether to hold an inquest.

8.7. If an inquest is to be held, direct the manager to proceed with the inquest.

Action By: Manager

8.8. Select an administrator to preside over the inquest and a pro tem staff attorney to assist.

8.9. Support the administrator in scheduling a pre-inquest conference and with clerical tasks.

Action By: Administrator

8.10. Hold a pre-inquest conference.

8.11. Conduct the inquest according to the procedures in Appendices 1 and 2.

Action By: Department of Public Defense

8.12. Assign counsel for the family of the decedent unless the family indicates they have retained other inquest counsel or do not wish to be represented by the King County Department of Public Defense. The Department of Public Defense will not be assigned in inquests where the family is to be represented by private counsel.

Action By: Superior Court

8.13. If an inquest is to be held, the Superior Court shall coordinate with the manager and administrator to supply a panel, recorder, and facilities pursuant to RCW 36.24.020.

9.0. APPENDICES

Procedures for Conducting Inquests.

10.0. PRIOR ORDERS

This Executive Order rescinds and replaces PHL 7-1-3, "Conducting Inquests in King County," dated December 4, 2019.

Appendix 2 - Procedures for Conducting Inquests:

If an inquest is to be held, the King County administrator shall conduct the review in accordance with these procedures.

1.0. FACILITIES/COURTROOM

1.1. The inquest is an administrative hearing intended to be a fact-finding, non-adversarial process. However, the King County Superior Court administers the jury process and maintains facilities appropriate to comfortably support a jury. Therefore, where requested by the County Executive, the Superior Court will coordinate with the manager to provide persons to serve as a jury of inquest ("panel") and secure appropriate facilities. The manager shall arrange the room in a manner that promotes transparency to the public and fair treatment of all participating parties.

2.0. PARTICIPATING PARTIES

2.1. The family of the deceased, who shall be allowed to have an attorney(s) present.

2.2. The law enforcement member(s) involved in the death, who shall be allowed to have an attorney(s) present.

2.3. The employing government department, which shall be allowed to be represented by its statutory attorney or lawfully appointed designee.

2.4. The manager, who shall assign an administrator and a pro tem attorney to assist the administrator.

2.5. An administrator, who shall preside over the inquest.

2.6. A representative appointed by the involved federally recognized Indian tribe, in the event that a death occurs on a federal Indian reservation or involves an enrolled member of a federally recognized Indian tribe.

3.0. ROLE OF THE ADMINISTRATOR/SCOPE OF THE INQUEST

3.1. An administrator shall conduct the inquest. The proceedings are quasi judicial in nature, with represented parties, and the presentation of evidence through direct and cross- examination, and subject to the Rules of Evidence. Administrators shall strive to promote an atmosphere consistent with administrative fact-finding and shall strive to minimize delay, cost, and burden to participants, while promoting fair and open proceedings. Although an inquest is not a court proceeding, administrators shall be guided by open courts principles and GR 16.

3.2. The administrator, after consultation with the participating parties, shall determine the inquest scope. Consistent with the purpose as set forth in the amended Charter, Executive Order, and Appendix 1 and 2, the inquest scope shall include an inquiry into and the panel shall make findings regarding the cause, manner, and circumstances of the death, including applicable law enforcement agency policy. The 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.

3.3. The Rules of Evidence shall generally apply, but may be supplemented and/or modified by additional rules governing administrative proceedings, at the discretion of the administrator. The administrator shall construe the Rules of Evidence in a manner consistent with the goal of administrative fact-finding proceedings and to promote fairness and to minimize the delays, costs, and burdens that can be associated with judicial proceedings.

4.0. DISCOVERY AND ADMISSIBILITY OF EVIDENCE

4.1. Discoverable material shall be exchanged among: the administrator and any pro tem attorney; the attorney representing the family of the deceased; the attorney representing the jurisdiction employing the involved law enforcement member(s); and the attorney representing the involved law enforcement member(s).

4.2. Discovery materials are to be used by the attorneys solely for the inquest proceeding. Such materials include the police and/or agency investigative file of the incident that resulted in the death. They also include the report of the medical examiner, crime laboratory reports, and the names, addresses, and summaries and/or copies of statements of any witnesses obtained by any party.

4.3. In the event that confidential materials in the possession of any person or agency are sought for use in the inquest, the administrator, upon a prima facie showing of necessity, relevancy, and lack of an alternative source for the materials, shall examine the materials in camera. These materials may include, and the administrator shall have the discretion to consider the admissibility and use of, information that may be relevant to the incident. The legal representative of the person or agency in possession of the materials shall have the right to participate in the review of these materials.

4.4. The decedent's criminal history may not be introduced into evidence unless the administrator first determines that: it is directly related to the reason for an arrest, detention, or use of force (e.g. officers were arresting an individual convicted of a felony who they believed was carrying a firearm); it served as the basis for an officer safety caution (or equivalent warning) that the member(s) of the law enforcement agency was aware of prior to any use of force; or other, contemporaneous knowledge of the individual's criminal history was relevant to the actions the officer(s) took or how the officer(s) assessed whether the person posed a threat.

4.5. If decedent's criminal history is admitted, it must be limited to the greatest extent possible. It may only include information both actually known to officer(s) at the time, and actually forming a basis for the decision to use deadly force or the tactics in approaching the individual. It may not include the specific crime of conviction, the nature of the crime (e.g. violent or nonviolent), the deceased's incarceration history, or any other criminal charge, unless the administrator makes a specific finding of relevance to a contested issue in the inquest.

4.6. The disciplinary history of the law enforcement member(s) involved may not be introduced into evidence unless the administrator first determines that it is directly related to the use of force. If such information is admitted, it must be limited to the greatest extent possible.

4.7. Protective orders may be used to limit discovery, and the administrator may order the return of all discretionarily-ordered discovery.

5.0 SCHEDULE AND PRE-INQUEST CONFERENCE

5.1. It is in the best interests of affected parties and the community to hold the inquest in a timely manner. The manager and administrator will strive for timeliness and to limit unnecessary delays; extensions shall be limited and granted only upon a showing of good cause.

5.2. The manager and administrator shall schedule a pre-inquest conference with the participating parties and may hold additional conferences if necessary. The administrator will obtain proposed witness and exhibit lists, proposed panel instructions, and inquest time estimates, and will inquire whether any special needs such as interpreters are required. The conference shall be public unless compelling circumstances require an in camera hearing, in which case the administrator must make findings of fact and conclusions of law justifying such measures under Washington law.

5.3. The administrator shall solicit proposed stipulations of fact from the participating parties and work diligently to narrow the scope of inquiry at the inquest. The administrator shall share the stipulated facts with the panel at the start of the inquest.

5.4. The administrator shall instruct the panel at the start of the inquest.

5.5. The manager shall maintain a website publishing the schedule for the inquest, stipulated facts, inquest file and, where possible, inquest recordings.

6.0. PANEL POOL

The administrator shall select the panel from the regular Superior Court juror pool pursuant to RCW 36.24.020.

7.0. PANEL QUESTIONING (VOIR DIRE)

7.1. The administrator shall conduct voir dire, after consultation with the participating parties.

7.2. There is no set limit to the number of panelists the administrator may excuse. Panelists may be excused for cause and/or because serving on the inquest panel will present a hardship.

8.0. PANEL QUESTIONS FOR PARTICIPANTS

After all parties have had an opportunity to examine a witness, panelists are allowed to submit questions to the administrator that the panel wishes to pose to the witness. After consultation with the parties, the administrator shall determine whether to submit a question to the witness and the manner of the submission.

9.0. RECORDING

The manager shall ensure that the inquest proceedings are audio recorded and that the audio recordings are made accessible to the public to the greatest extent consistent with GR 16.

10.0. MEDIA GUIDELINES

Consistent with Section 9, above, the administrator shall make the proceedings available to the public and to the media, this includes video and audio recording and still photography.

11.0 ORDER OF PRESENTATION OF EVIDENCE

11.1. There shall be no opening statements by the parties. The judge's introduction will include an instruction in substantially the following form: "You have been empaneled as members of a coroner's panel in the inquest. This is not a trial. The purpose of the inquest is to provide public inquiry into the causes and circumstances surrounding the death of [decedent]. It is not the purpose of this inquest to determine the criminal or civil liability of any person or agency. Your role will be to hear the evidence and answer questions according to instructions given to you at the close of the proceedings. The pro tem staff attorney's role is solely to assist the administrator in presenting the evidence. As administrator I have determined who will be called as witnesses and the issues which you will be asked to consider."

11.2. The administrator through the pro tem attorney has the first opportunity to introduce witnesses and evidence. The parties may then each introduce their own witnesses and evidence.

11.3. The administrator, after consultation with the parties, decides the order of presentation of evidence and witnesses. The administrator may direct that the pro tem attorney conduct the initial examination of each witness.

11.4. The administrator shall make rulings on the admissibility of evidence and testimony based on the Rules of Evidence and these procedures.

12.0 WITNESSES AND TESTIMONY

12.1. Each party, including the administrator, through the pro tem staff attorney, may proffer its own witnesses to provide testimony that aids the panel in the understanding of the facts, including factual areas of experts (e.g. ballistics and forensic medical examination).

12.2. The administrator shall base rulings on the admissibility of such testimony on the proposed witness's qualifications, the Rules of Evidence, and these procedures. Testimony regarding changes that should be made to existing policy, procedure, and training is not permitted.

12.3. The employing government department shall designate an official(s) to provide a comprehensive overview of the forensic investigation into the incident (e.g., statements collected by investigators, investigators' review of forensic evidence, physical evidence collected by investigators, etc.). Additionally, the chief law enforcement officer of the

involved agency or director of the employing government department shall provide testimony concerning applicable law enforcement agency training and policy as they relate to the death but may not 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.

12.4. 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.

12.5. At the conclusion of the testimony, the administrator will solicit from the pro tem attorney and/or from the participating parties additional submissions of proposed stipulated facts. The administrator will determine which, if any, proposed stipulated facts should be submitted to the panel.

13.0. STATEMENTS OF SUMMATION

The pro tem attorney and the participating parties may offer statements of summation only if preapproved by the administrator in consultation with the parties. Statements must be consistent with the fact-finding purpose of the inquest and must not suggest conclusions of law or bear on fault.

14.0. PANEL QUESTIONS

14.1. After the conclusion of testimony, each party shall submit to the administrator proposed questions for the panel. After consultation with the parties, the administrator shall determine which questions are within the scope of the inquest and should be submitted to the panel. Prior to the statements of summation, the administrator shall provide the panel with the list of questions.

14.2. The inquest administrator shall give written instructions to the panel and shall submit questions to be answered, subject to the limitations of Section 3 (above) and keeping in mind the purpose of an inquest. The administrator shall instruct the panel that it may not comment on fault, or on justification-including the mental state of the involved officer(s), such as whether the officer thought the decedent posed a threat of death or serious bodily injury to the officer(s)-or on the criminal or civil liability of a person or agency.

14.3. Beyond these limitations, the panel shall not be confined to the stipulated facts, but may consider any testimony or evidence presented during the inquest proceeding. In answering any question, the panel may not consider any information learned outside of the inquest.

14.4. Questions submitted to the panel must provide three response options: "yes," "no," and "unknown." A panelist shall respond "yes" when the panelist believes a preponderance of the evidence supports responding to the question in the affirmative. A panelist shall respond "no" when the panelist believes a preponderance of the evidence supports responding to the question in the negative. A panelist shall respond

"unknown" if either (1) the weight of the evidence equally supports responding to the question in the affirmative and the negative or (2) not enough evidence was presented to allow the panelist to answer the question in the affirmative or the negative.

14.5. The panel shall deliberate and panelists shall exchange their interpretations of the evidence. However, the panel need not reach unanimity and each panelist shall be instructed to answer the questions individually.

14.6. After every question, each panelist shall have the opportunity to provide a written explanation of the panelist's answer. The administrator shall direct each panelist that the panelist need only provide a written explanation when the panelist believes that a written explanation would provide information helpful in explaining or interpreting the panelist's answer.

15.0. FINDINGS

15.1. The manager shall transmit the panel's findings to the County Executive.

15.2. The manager shall ensure the findings and recommendations are published on its website along with the inquest recording.

16.0. ANNUAL REVIEW

16.1. The manager shall submit a report to the County Executive at the end of each year on the operations of inquests.

16.2. The County Executive will call for a periodic review of the inquest process by an independent review committee to determine if the inquest process is conforming to updated laws and adequately meeting the principles of transparency, community engagement, and respect for all those involved in the inquest process.

APPENDIX C

King County Ordinance No. 18652



KING COUNTY

1200 King County Courthouse
516 Third Avenue
Seattle, WA 98104

Signature Report

January 30, 2018

Ordinance 18652

Proposed No. 2018-0028.3

Sponsors Kohl-Welles, Dembowski,
Upthegrove and Gossett

1 AN ORDINANCE relating to the department of public
2 defense; requiring the department to provide legal
3 representation in the inquest process to families of
4 decedents; and adding a new section to K.C.C. chapter
5 2.60.

6 BE IT ORDAINED BY THE COUNCIL OF KING COUNTY:

7 SECTION 1. Findings:

8 A. Section 895 of the King County Charter states, "An inquest shall be held to
9 investigate the causes and circumstances of any death involving a member of the law
10 enforcement agency of the county in the performance of the member's duties." Section
11 350.20.60 of the King County Charter establishes the department of public defense and
12 directs it to provide legal counsel to indigent individuals as required under the state and
13 federal constitutions and to foster access to justice and equity in the criminal justice
14 system, and also authorizes additional duties to be prescribed by ordinance.

15 B. Between 2012 and 2016, there have been thirty-four deaths involving a
16 member of a law enforcement agency that resulted in an inquest.

17 C. Of those thirty-four inquests, twelve families obtained legal counsel.

18 D. Families whose loved ones have been killed by a member of a law
19 enforcement agency may seek to understand through the inquest process the cause and

20 circumstances of the decedent's death.

21 E. The inquest process serves the public function of fact finding related to a death
22 and involves formal legal proceedings, discovery and examination of persons, including
23 law enforcement personnel and expert witnesses.

24 F. In King County, the function of holding inquests is vested in the executive.

25 G. The executive has adopted Executive Order PHL 7-1-1 (AEO) establishing
26 policies and procedures for the inquest process which includes the courts conducting the
27 inquest on the executive's behalf. In those policies and procedures, although the family
28 of the decedent is designated as a participating party in the inquest, a number of
29 important steps in the inquest can only be done by legal counsel representing the family.

30 H. Families not represented by legal counsel will not have the benefit of legal
31 expertise to assist them in understanding the inquest proceedings, and will not be able to
32 fully participate in the inquest process, including participating in the preinquest hearings,
33 engaging in discovery or examining witnesses at the inquest, including law enforcement
34 personnel.

35 I. The lack of legal representation may result in families not fully participating in
36 the inquest process and a less robust fact finding process.

37 NEW SECTION. SECTION 2. There is hereby added to K.C.C. chapter 2.60 a
38 new section to read as follows:

39 A. There is a public benefit in providing publicly financed legal counsel to
40 families of the decedents wishing to fully participate in the inquest process. The inquest
41 process is a formal legal proceeding, involving discovery of evidence and examining of
42 witnesses, including law enforcement personnel and experts. Publicly financed legal

43 counsel will allow all families to fully and equitably participate in the inquest process
44 regardless of financial means. Inquests serve a public function of determining the cause
45 and circumstances of any death involving a member of a law enforcement agency in the
46 performance of the member's duties. The findings of an inquest help the public, family
47 members of decedents and policy makers understand the causes and circumstances of the
48 decedent's death. Public financing of legal counsel for all families of decedents will
49 better ensure each party to an inquest will have equal opportunity to participate.
50 Increasing such participation will bolster the transparency of the inquest process, thus
51 furthering the recognized public function of an inquest. Therefore, the department shall
52 provide legal representation at public expense to the family participating in an inquest,
53 regardless of the income level of the members of the family, of the person whose death is
54 the subject of an inquest investigating the causes and circumstances of death involving a
55 member of any law enforcement agency within King County under Section 895 of the
56 King County Charter or RCW 36.24.020. Representation shall not be provided if the
57 family does not wish to be represented by the department's attorneys. The legal
58 representation shall be limited to preparation for the inquest and participation during the
59 inquest and shall not include any representation for the purpose of potential related civil
60 litigation.

61 B. The executive shall revise any executive orders relating to inquests to reflect
62 this section within one hundred twenty days of enactment of this ordinance.

63 C. For the purposes of this section:

64 1. "Family" refers to the group of those individuals determined by the person
65 conducting the inquest to have a right to participate as the family of the decedent.

66 2. "A member of a law enforcement agency" means a commissioned officer or
67 noncommissioned staff of a local or state police force, jail or corrections agency.
68

Ordinance 18652 was introduced on 1/8/2018 and passed as amended by the
Metropolitan King County Council on 1/29/2018, by the following vote:

Yes: 9 - Mr. von Reichbauer, Mr. Gossett, Ms. Lambert, Mr. Dunn,
Mr. McDermott, Mr. Dembowski, Mr. Upthegrove, Ms. Kohl-Welles
and Ms. Balducci
No: 0
Excused: 0

KING COUNTY COUNCIL
KING COUNTY, WASHINGTON



Joseph McDermott, Chair

ATTEST:



Melani Pedroza, Clerk of the Council



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CLERK

APPROVED this 5 day of FEBRUARY, 2018.



Dow Constantine, County Executive

Attachments: None

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 1, 2020, I electronically filed the foregoing document with the Clerk of the Court using the electronic filing system which will send notification of such filing to the following electronic filing system participants:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 1st day of October, 2020 at Bellevue, Washington.


RAFAEL MUNOZ-CINTRON
Legal Assistant
King County Prosecuting
Attorney's Office

KING COUNTY PROSECUTING ATTORNEYS OFFICE CIVIL DIVISION

October 01, 2020 - 4:45 PM

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Comments:

APPELLANT KING COUNTY ♦S OPENING BRIEF

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