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Supreme Court 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.

On Appeal From

KING COUNTY SUPERIOR COURT NO. 20-2-01420-6 SEA

**APPELLANT INQUEST ADMINISTRATOR SPEARMAN'S
OPENING BRIEF**

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I. INTRODUCTION

The Superior Court erred in this case by dictating that certain procedures may not be followed when the King County Executive exercises its discretionary authority to commence and conduct a coroner's inquest pursuant to chapter 36.24 RCW (the "Coroner's Statute") and the Executive's authority under King County's Charter and ordinances. The Superior Court's order should be reversed and the injunction should be vacated immediately so that the Executive may resume the important work of holding public inquests into the circumstances of deaths involving law enforcement officers.

The Coroner's Statute's plain language commits the decision of whether to commence an inquest to the discretion of the coroner. RCW 36.24.020 ("Any coroner, *in his or her discretion*, may conduct an inquest if . . .") (emphasis added). Likewise, the statute leaves to the discretion of the presiding officer and the inquest jury what witnesses and evidence should be considered. RCW 36.24.050 (coroner is to summon witnesses who "in his or her opinion" have knowledge of the facts); *Carrick v Locke*, 125 Wn.2d 129, 144 n.9, 882 P.2d 173 (1994) ("[I]t is for the judge and jury alone to decide what matters must be properly inquired into in order to fulfill their statutory duty."). As explained in more detail in the Executive's brief, King County has vested the coroner's authority over inquests with the Executive. The Superior Court correctly recognized that the Executive's decisions of when to commence an inquest and how to conduct it are discretionary policy-making decisions and that

Washington's law on separation of powers makes them inappropriate subjects for judicial oversight by way of writs.

Despite recognizing the limits on judicial oversight relating to coroner's inquests, the Superior Court went on to declare that the procedures adopted by the Executive were invalid and issued an injunction prohibiting inquests under those procedures because they were not "fair." CP 2422 ("How is that fair?"). The court made specific and detailed holdings about the proper scope of the inquest proceedings and admissibility of witnesses and evidence. The Superior Court may not substitute its judgment for the Executive's in this manner. Further, the court's rulings misapprehend both the nature of a coroner's inquest and this Court's decisions on when the "appearance of fairness" doctrine properly applies.

Coroner inquests are an important fact-finding tool used by the Executive Branch to determine what happened when a member of the community dies under suspicious or unusual circumstances. King County conducts an inquest when law enforcement in the County is involved in such a death. These proceedings provide the families of the deceased, the community in which the death occurred, the involved officers and the agencies that employ them with a public process by which a jury hears the evidence and makes factual findings about what happened.

Coroner's inquests *are not* proceedings that make any binding legal or factual determinations. The inquest jury's factual findings are not binding in any future proceeding. An inquest is "a nonbinding factual

inquiry and does not result in a determination of guilt or responsibility.”

Miranda v. Sims, 98 Wn. App. 898, 903, 991 P.2d 681 (2000).

Underscoring this fact, in 2016, the Legislature removed the Coroner’s authority to issue an arrest warrant based on the inquest jury’s findings. Coroners—Arrest Warrant Authority, Laws of 2016, ch. 186, § 1. Those findings are provided to the Executive (per the Executive Order) and to the Prosecutor under certain circumstances per statute.

These fact-finding, non-binding proceedings that do not determine anyone’s rights or liabilities are not the kind of proceedings to which this Court applies the “appearance of fairness” doctrine. This Court has recently said so in plain language: “The doctrine does not apply to executive functions such as prosecutorial inquests or coroner inquests.” *In re Petersen*, 180 Wn.2d 768, 786 n.17, 329 P.3d 853 (2014). Certain Respondents’ contend that dicta in the 1994 decision in *Carrick* makes the doctrine applicable to how the Executive conducts inquests. This argument misreads *Carrick* and this Court’s decisions on when the doctrine applies. Moreover, the Court’s “concerns” in *Carrick* related to whether a designee in the Executive Branch could be objective in conducting an inquest regarding a law enforcement officer who was, at that time, also under the Executive’s supervision. Those concerns disappeared in 1996 when the Sheriff became an elected official in King County and took over the job of managing County law enforcement and they have never existed with regard to law enforcement agencies other than the Sheriff’s Office.

Neither the Executive’s policy-making decisions (in adopting procedures for inquests) nor the Inquest Administrator’s application of those procedures are proper areas for applying the appearance of fairness doctrine. The Superior Court’s decision to invalidate the Executive Orders on this basis was erroneous and should be set aside.

The Superior Court also erred in declaring that an officer presiding in a coroner’s inquest lacks authority to compel pre-hearing discovery by obtaining a subpoena through a request to the Superior Court.¹ The Legislature amended the Coroner’s Statute in 2019 in direct response to this Court’s ruling that coroners lacked subpoena power until an inquest jury panel had been summoned or to compel testimony or document production in advance of the inquest hearing. *See* RCW 36.24.200 (“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”). Because King County has placed the Coroner’s inquest authority with the Executive, this additional statutory subpoena power resides with the Executive and any designee exercising that authority so that these important public proceedings can be run in an efficient and fair manner. The Superior Court’s order should be set aside on this point.

¹ The Superior Court also erred in its declaratory judgment rulings on: (1) whether the King County’s charter provisions on delegation of authority to the Executive violated the state Constitution and (2) whether the procedures adopted by the Executive violated the Fifth or Sixth Amendment rights of the involved officers. Those issues are addressed in detail in the Executive’s briefing. Inquest Administrator Spearman joins in those arguments.

Finally, certain Respondents ask that this Court review and invalidate the Executive Order's provision and the Inquest Administrator's order regarding how the inquest proceedings will be made available to the public. Public access to government is a bedrock principle under Washington law and the public's having access to these fact-finding proceedings is vital. The Executive Order's direction that the proceedings should be made public under the well-tested guidance of GR 16 and Administrator Spearman's Amended Media Order specifying how media access would be provided for inquest hearings are proper exercise of discretion and in line with policies underlying coroner's inquests. Those determinations should be upheld.

II. ASSIGNMENTS OF ERROR

A. Assignments of error

1. The Superior Court erred in ruling that coroner inquests are "quasi-judicial proceedings" to which the appearance of fairness doctrine applies.

2. The Superior Court erred in ruling that the appearance of fairness doctrine precludes the King County Executive from designating an Executive Branch employee to preside over coroner inquests.

3. The Superior Court erred in ruling that certain issues or witnesses must or must not be included within the scope of the inquiry.

4. The Superior Court erred in ruling that the presiding officer at an inquest hearing may not compel pre-hearing discovery, including document production and depositions.

5. Though not ruled upon by the Superior Court, principles of open government dictate that a coroner and a presiding officer at an inquest may make those proceedings available to the public through means that balance privacy interest with the public's right of access.²

B. Issues Related to Assignments of Error

1. Does the appearance of fairness doctrine apply to coroner inquests, which are fact-finding proceedings conducted by the Executive that do not result in any binding determinations?

2. Do the appearance of fairness concerns discussed in dicta in *Carrick v. Locke* apply when the Executive is no longer directly responsible for the conduct of any of the involved law enforcement officers?

3. Does a presiding officer exercising a coroner's inquest authority have discretion to determine the scope of the inquest proceedings, including the admissibility of lay and expert witness testimony and relevant lines of inquiry?

4. Does RCW 36.24.200 authorize a presiding officer exercising a coroner's inquest authority to obtain pre-hearing subpoenas for use in inquest proceedings?

5. Is the process by which inquest proceedings are made available to the public a discretionary policy decision for the Executive or a designee?

² Administrator Spearman joins in the Executive's Assignments of Error and provides the assignments of error above as issues that are of particular import to the Administrator.

III. STATEMENT OF THE CASE

A. Overview of Inquests in King County

A coroner's inquest is an investigative inquiry where a jury is tasked with finding "who died, what was the cause of death, and what were the circumstances surrounding the death." *Carrick*, 125 Wn.2d at 133. Inquests are authorized by chapter 36.24 RCW, which sets out the duties assigned to the county coroner and provides the coroner with discretion to hold inquests under certain circumstances.

The Coroner's Statute allows counties of a certain size to have an appointed Medical Examiner perform coroner duties. RCW 36.24.190. For decades, King County has split the coroner's duties between the medical examiner and the Executive, with the coroner's authority to conduct inquests residing with the Executive. *See Carrick*, 125 Wn.2d at 139 (citing prior King County Code provision).

The current King County Code continues this arrangement. The Medical Examiner is in the Prevention Division of the Department of Public Health. *See King County Code (K.C.C.) 2.35A.050(E)* (division performs "medical examiner and statutory coroner duties as described in K.C.C. 2.35A.090"). The Medical Examiner conducts death investigations "except for the holding of inquests, which function is vested in the county executive." K.C.C. 2.35A.090(B). In the next sub-section, the Code says 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" but allocates the institution of "procedures and policies" for inquests to the Executive. K.C.C.

2.35A.090(C) (“except for the holding of inquests, which function is vested in the county executive”).

The Code grants the Medical Examiner authority to issue subpoenas in the course of investigating cases that are “under the jurisdiction of the medical examiner.” K.C.C. 2.35A.090(E). It does not address the Executive’s ability to issue subpoenas in inquests, nor is it necessary for it to do so. The Executive, exercising the coroner’s authority “vested” in him by the Charter and Code, has subpoena power as provided by the Coroner’s Statute. RCW 36.24.020, .200.

This Court has previously ruled that the Executive can adopt inquest procedures so long as they do not conflict with the express terms of the Coroner’s Statute. *Carrick*, 125 Wn.2d at 144. And those procedures may include selecting a designee to perform, on behalf of the Executive, the job of presiding over the actual inquest hearings. *Id.* at 141.

Since at least 1985, the King County Executive has promulgated executive orders establishing policies, procedures, and rules governing inquest proceedings. *See* CP 1435, 1449–1500. Each of the orders allowed specified “parties” to participate in the inquest proceeding through counsel, provided for pre-inquest discovery to maintain an efficiently-run proceeding, and delegated authority to preside over the inquest to a district court judge, who was assisted by the deputy prosecuting attorney. *Id.* at 1436. Under each of the orders, the parties could submit proposed jury instructions, interrogatories for the jury, and areas of inquiry at the

proceeding. *Id.* The inquest judge was given the discretion to determine the scope of the inquest. *Id.*

B. Suspension of Inquests and Revisions of Inquest Procedures

In 2017, King County Executive Dow Constantine established a six-member Inquest Review Committee and temporarily suspended all inquests. CP 1437. The pending inquests that were suspended were: Isiah Obet, Damarius Butts, Eugene D. Nelson, Tommy Le, and Charleena Lyles. *Id.*

On January 8, 2018, shortly after the Review Committee began its work, then-Presiding District Court Judge, the Honorable Donna Tucker, notified the Executive Constantine that the District Court would no longer assign judges to future inquest proceedings. CP 1528. Judge Tucker explained that she was concerned that the use of district court judges “created unintended expectations from the public and parties about the limited nature of inquiry during coroner inquests.” *Id.*

Three months later, the Review Committee issued an 89-page report recommending significant changes to the inquest process and outlining a proposed revised executive order. CP 310–98. The proposed executive order was reviewed and supplemented by members of law enforcement and other community advocates, culminating in a proposed Compromise Order. CP 1530–42.

C. Revised Executive Orders

2018 Executive Order. On October 3, 2018, the King County Executive signed Executive Order PHL 7-1-2: Conducting Inquests in King County (the “2018 Executive Order”). CP 1502–13. The new Order

retained elements from previous orders and adopted many of the changes submitted in the proposed Compromise Order. Under the 2018 Executive Order, the Prosecuting Attorney's Office assembled files and recommended whether an inquest should be ordered. CP 1505 (EO App. 1, § 7.1). The Order also continued to provide for the exchange of relevant material among the participating parties before the inquest hearing and maintained procedures to limit the scope of discovery if necessary. CP 1508–09 (EO App. 2, § 4).

Consistent with the District Court's decision to forego further involvement in inquests, the 2018 Executive Order established a new inquest program, overseen by a Program Manager, with inquest proceedings presided over by Inquest Administrators. CP 1504–06 (EO App. 1, §§ 5.10, 8). The Order eliminated the role of the prosecuting attorney in presenting evidence at the inquest hearing, assigning that function to a pro tem attorney. *See* CP 1506 (EO App. 1, § 8.0). The Order also provided for an up-to-date webpage listing dates, times, and locations of upcoming inquests and tasked the Inquest Administrator to “make the proceedings available to the public and to the media.” CP 1511 (EO App. 2, § 9–10).

The 2018 Executive Order also reflected the Executive's policy decision that the scope of inquiry at an inquest should include the involved officers' training and agency policy. The order required “the chief law enforcement officer of the involved agency or director of the employing government department . . . to provide testimony concerning applicable

law enforcement agency training and policy as they relate to the death.” CP 1512 (EO App. 2, § 12.3). However, it did not permit that officer to opine as to whether the law enforcement officer’s actions were consistent with training and policy. *Id.* Instead, the inquest jurors were directed to make independent findings as to whether “the law enforcement officer complied with applicable law enforcement training and policy as they relate to the death.” CP 1508 (EO App. 2, § 3.2).

The 2018 Executive Order prohibited the issuance of subpoenas for law enforcement officers. CP 1506 (EO App. 1, § 8.5). It provided that involved officers were deemed “participating parties” who were entitled to counsel, but only if the officer “elect(s) to participate in the inquest proceeding. CP 1508 (EO App. 2, § 2.2).

Finally, the Order directed the Inquest Administrator to instruct the inquest 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.” CP 1512–13 (EO App. 2, § 14.2).

2019 Executive Order. On December 4, 2019, the Executive issued Executive Order PHL 7-1-3 (the “2019 Executive Order”), which revised the 2018 Executive Order to clarify that the officers’ participation required testifying at the inquest. CP 1562–73. As described below, this revision was prompted by one of Administrator Spearman’s pre-hearing orders in the Butts Inquest regarding the involved officer’s right to participate through counsel.

2020 Executive Order. On June 11, 2020, after litigation in this matter had commenced, the Executive issued Executive Order PHL 7-1-4 (the “2020 Executive Order”). CP 1562–73. This Order made two additional revisions: (1) it eliminated the requirement in the 2019 Executive Order that the involved officers had to testify at the inquest hearing in order to participate through counsel; and (2) it provided that involved officers could be subpoenaed to testify at the inquest hearing along with other witnesses. CP 1566 (EO App. 1, § 8.5), 1568 (EO App. 2, § 2.2).³

D. Inquest Proceedings Resume

Following the 2018 Executive Order, executive staff hired an inquest program manager, a pro tem attorney, and a pool of three Inquest Administrators: Retired Judge Michael J. Spearman, Retired Judge Terrence Carroll, and Retired Judge Robert McBeth. CP 1445. The inquests that had been temporarily suspended were reassigned to Inquest Administrators and proceedings recommenced. CP 1555–60.

Inquest Administrator Spearman presided over the inquests of Isaiah Obet, Damarius Butts, and Charleena Lyles. CP 1862. During each of these matters, Administrator Spearman made certain pre-hearing rulings that were challenged in this litigation. A brief description of those rulings follows.

³ Although the 2018 Executive Order was twice amended after its promulgation, the substance of the Order remained largely the same. For the purposes of this brief, the term “Executive Order” refers to the most recent version of the Executive Order, including the 2019 and 2020 revisions. Where differences in the versions of the Executive Order are relevant, those versions will be referred to with specificity (*e.g.*, the 2019 Executive Order).

Officer Participation. In the course of pre-hearing conferences in the inquest into the death of Damarius Butts, counsel for the family moved to condition the officers' attorneys' participation at the inquest on the officers' agreement to testify at the inquest hearing. In a November 5, 2019 pre-hearing order, Inquest Administrator Spearman denied the family's motion. CP 184. This ruling prompted the Executive's December 4, 2019 revision to the Executive Order.

Pre-hearing Subpoenas. In the Butts Inquest, the family moved to compel the depositions of two Seattle Police Detectives. CP 184. Administrator Spearman ordered the depositions to occur. *Id.* No subpoenas were requested from the Superior Court by the pro-tem attorney, however, because the officers voluntarily complied with Administrator Spearman's order. CP 1863.

Expert Witnesses. In the Lyles Inquest, the Administrator issued an order stating:

Any party intending to call an expert witness to testify shall provide their identity by December 16, 2019. A schedule for production of the material required under Civil Rule 26(a)(5)(a)(i), and a schedule for declaring responsive experts and for briefing objections to calling such witnesses will be provided for at a later time.

CP 1207. None of the parties in the Lyles Inquest had proposed expert witnesses at the time the proceedings were stayed by this litigation.

Media Access. Administrator Spearman also issued proposed and amended media orders in the Butts Inquest outlining the guidelines for

media access at the inquest hearings. CP 1869–71.⁴ The amended order permitted media access, livestreaming, filming, voice recording and photography. CP 1869. It prohibited the recording or photography of any juror, prohibited filming or photographing the contents of any document on counsel table, and provided a procedure for the parties to raise objections to the filming or transmission of particularly sensitive or graphic images. CP 1870–71.

E. Litigation in the Superior Court

In January 2020, Respondents brought multiple challenges to the Executive Order by seeking extraordinary writs and declaratory judgment. *See* CP 1–19; 232–70; 644–56; 859–66. The actions were consolidated under a single case number. CP 1140–42. A summary of the issues and positions presented by the various parties follows:

The Family of Damarius Butts. The Family of Damarius Butts filed a petition for writ of mandamus. The family argued that the 2018 Executive Order violated RCW 36.24.050 because it prohibited the coroner or inquest jury from subpoenaing involved officers.

The Family of Isaiah Obet. The Family of Isaiah Obet petitioned for a writ of mandamus. CP 1–19. The family argued that the Executive Order violated RCW 36.24.070 because it prohibited the inquest jury from making a determination of criminal liability. *Id.*

The Maternal Family of Charleena Lyles. The Maternal Family of Charleena Lyles intervened in this action, seeking a writ of mandamus.

⁴ In an October 22, 2019 Pre-Inquest Conference Order, Administrator Spearman proposed substantively the same media order in the Lyles Inquest. CP 1207.

CP 1164–76. The family joined the brief of the Family of Damarius Butts in its argument that the Executive Order violated Washington law by prohibiting the coroner or jury from subpoenaing the involved officers. CP 1165. The family also joined the Family of Isiah Obet in arguing that the Executive Order violated Washington law by prohibiting the inquest jury from making a determination of criminal liability. *Id.*

The Seattle Police Officers. Certain Seattle Police Officers petitioned for a writ of prohibition, writ of review, and declaratory and injunctive relief. CP 644–56. They made the following arguments:

- The Executive exceeded the scope of his authority by expanding the statutory scope of the coroner’s inquest. CP 662–63.
- Evidence of officer training and policy is outside the purpose and scope of the coroner’s inquest. CP 664–65.
- The Executive’s designation of inquest responsibilities to an executive-branch employee violated the appearance of fairness doctrine. CP 663–64.
- Conditioning the involved officer’s right of participation with counsel on their agreement to testify violates their constitutional rights and the appearance of fairness doctrine. CP 665–67.
- The Inquest Administrator does not have pre-inquest subpoena authority. CP 667–72.
- The Inquest Administrator may not exclude witnesses based on prejudice to an inquest party.⁵ CP 673.

⁵ The City of Seattle also filed suit, raising arguments that overlapped with those made by the Intervenor Cities and the involved police officers, CP 232–70, but voluntarily

Intervenor Cities and Sheriff’s Office. The Cities of Auburn, Federal Way, Kent, and the King County Sheriff’s Office (collectively, “Intervenor Cities and Sheriff”) petitioned for a writ of prohibition, writ of review, and declaratory and injunctive relief. CP 859–66. The Intervenor Cities and Sheriff joined the briefs of the City of Seattle and Seattle Police Officers. CP 860. The Intervenor Cities and Sheriff made the following additional arguments:

- The Executive lacks authority to conduct inquests for officers other than the King County Sheriff or other County officers. CP 862.
- The Obet, Nelson, and Le inquests are time barred. CP 864.
- Expert testimony is limited to issues of medical forensics and ballistics. *Id.*

By agreement of the parties, the Superior Court entered an order staying all inquest proceedings pending the outcome of the litigation. CP 1155–61. On June 11, 2020, the Executive issued the 2020 Executive Order. CP 1562–73.

The King County Superior Court, Honorable Julie Spector presiding, heard oral argument on the consolidated matters on July 17, 2020. CP 2304–05. On August 21, 2020, the Superior Court issued its order denying the applications for extraordinary writs and granting a permanent injunction invalidating the Executive Order. CP 2381–2406. The injunction precludes: (a) allowance of prehearing written discovery;

dismissed its lawsuit before the Superior Court heard oral argument, CP 1319–22, 2017–20.

(b) issuance of pre-hearing “discovery” subpoenas; (c) introduction of evidence or testimony regarding training and policy; (d) limitation of chief law enforcement officer’s testimony regarding compliance with training and policies; (e) allowance of expert witness testimony other than by experts involved in the medical examiner’s investigation; and (f) Executive Branch at-will employees designated by the Executive from serving as the presiding officer at inquest hearings. *Id.*

The Executive and Administrator Spearman filed a notice of appeal on September 1, 2020. CP 2407–08. On September 17, 2020, this Court set the Executive’s motion for expedited briefing and oral argument for hearing on October 6, 2020. Pursuant to the Court’s order, Appellants are filing their opening briefs on October 1, 2020.

IV. ARGUMENT

A. The appearance of fairness doctrine does not apply to coroner’s inquest proceedings, which are non-binding investigations conducted by the Executive Branch.

“The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of the courts.” *State ex rel. Barnard v. Board of Educ.*, 19 Wash. 8, 17, 52 P. 317 (1898). Equally fundamental is the division of power between separate, coequal branches of government. *See Carrick*, 125 Wn.2d at 135 (the separation of powers doctrine “ensure[s] that the fundamental functions of each branch remain inviolate”). As this Court has repeatedly recognized, the appearance of fairness doctrine cannot be used to circumvent the separation of powers doctrine and subject purely legislative or executive functions to judicial

oversight. By applying the appearance of fairness doctrine to inquest procedures, that is precisely what the Superior Court has done.

1. The appearance of fairness doctrine applies only to proceedings that have the power to determine the parties' rights.

This Court's decisions on the appearance of fairness doctrine instruct that the doctrine should be applied sparingly, keeping in mind the character of the challenged decision and respecting the roles of the distinct branches of government. *See Harris v. Hornbaker*, 98 Wn.2d 650, 659, 658 P.2d 1219 (1983); *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 247–48, 821 P.2d 1204 (1992). The doctrine applies only to quasi-judicial proceedings, which must have the ability to affect the rights of the parties. *See State v. Post*, 118 Wn.2d 596, 618–619, 826 P.2d 172, *amended*, 118 Wn.2d 596 (1992). The Legislature made this explicit in in land use proceedings by limiting application of the doctrine to specified officers and “boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding.” RCW 42.36.010.

This Court's decisions demonstrate that this requirement extends to all applications of the appearance of fairness doctrine. A proceeding is not quasi-judicial—and the appearance of fairness doctrine does not apply—unless that proceeding has the ability to determine the rights of the parties.

a. Early decisions demonstrate a rapid expansion of the doctrine followed by substantial retreat.

The appearance of fairness doctrine initially focused on the distinction between the judiciary and the legislature. The first articulation

of the doctrine appears in the 1969 case of *Smith v. Skagit County*, which involved the rezoning of island property for heavy industrial use. 75 Wn.2d 715, 453 P.2d 832. The *Smith* Court articulated three broad maxims: first, if a public hearing is required by law, it must be fair in appearance and substance; second, the standard applies to both legislative and quasi-judicial proceedings; and third, the test for fairness is that a fair minded person must conclude that the hearing was unbiased. *See id.* at 739–42.

Although early cases discussing the appearance of fairness doctrine suggested that was rooted in due process, *see, e.g., State ex rel. Beam v. Fulwiler*, 76 Wn.2d 313, 315–16, 456 P.2d 322 (1969), the Court later declared that the doctrine was not constitutionally based, *City of Bellevue v. King Cty. Boundary Review Bd.*, 90 Wn. 2d 856, 863, 586 P.2d 470 (1978). Accordingly, in 1982, the Legislature limited and clarified the doctrine’s application in local land use decisions. The Appearance of Fairness Statute, Laws of 1982, Ch. 229, § 1 (codified at RCW 42.36.010 *et seq.*). The statute provides that the doctrine’s application “shall be limited to the quasi-judicial actions of local decision-making bodies.” RCW 42.36.010. The statute defines “quasi-judicial actions” as

[t]hose actions of the legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment, or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding.

Id.

Following the passage of the statute, courts began restricting the doctrine's application by narrowing the definition of quasi-judicial proceedings. In *Harris v. Hornbaker*, the Court held that a decision by a board of county commissioners regarding where to locate a highway interchange was legislative and the appearance of fairness doctrine did not apply. 98 Wn.2d at 659. In so doing, the Court rejected its prior rationale in *Smith* that the appearance of fairness doctrine is triggered by the fact that a hearing is required by statute. *Id.*

The *Harris* Court invoked separation of powers concerns as a basis for narrowly applying the appearance of fairness doctrine. The Court remarked,

[T]he scope of a fairness inquiry is framed by the type of decision being made. In an adjudicatory setting, impartiality and lack of bias are required of decision makers. This is not true in the legislative process, however. . . . This concept limits, to an extent, the role of the courts in reviewing legislative decisions.

Id. at 656–57 (citations omitted). The Court further cautioned that courts should resist formulaic application of the doctrine and look instead to the nature of the underlying function being carried out: “A public hearing is not a talisman for invoking the appearance of fairness doctrine Prior cases should not be interpreted as indicating that a decision becomes quasi[-]judicial and triggers the appearance of fairness doctrine by the mere fact that a hearing is required by statute.” *Id.* at 660.

The Court reaffirmed this sentiment in *Raynes v. City of Leavenworth*. The Court held that textual zoning challenges are not quasi-

judicial, even where they affect only one site or property owner. 118 Wn.2d at 247–48. It emphasized, “[N]o test should be rigidly applied. Rather, a flexible approach should be employed which gives ample consideration to the functions being performed by the decisionmaking body.” *Id.* at 243.

b. Application of the appearance of fairness doctrine to executive branch functions turns on whether the decision can affect the rights of the parties.

Cases applying the appearance of fairness doctrine to functions of the Executive Branch hail from a comparatively modern vintage. These cases continue the Court’s trend towards restricting the doctrine’s application in favor of upholding the separation of the distinct branches of government. In *State v. Post*, the Court considered whether the appearance of fairness doctrine applies to an allegedly-biased presentence report writer. 118 Wn.2d at 618–619. The Court held that the doctrine did not apply because the writer was not a judicial or quasi-judicial decisionmaker. *Id.* The Court also imposed a new threshold inquiry for challenges under the doctrine: “Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit.” *Id.* at 619. Mandating a threshold showing of evidence of bias marks a substantial limitation on the former “disinterested person” standard.

In *Carrick v. Locke*, a party to an inquest proceeding challenged the King County executive order about inquests in effect at the time as violating separation of powers and the appearance of fairness doctrine. 125 Wn.2d at 143 n.8. Specifically, the respondent contended that the

prosecutor should not be allowed to present evidence in the inquest proceedings. The Court concluded that the appearance of fairness doctrine did not apply to prosecutors because “[t]he prosecutor is not the decision maker at the inquest.” *Id.*

The Court again rejected the application of the appearance of fairness doctrine to a prosecutor in *State v. Finch*, 137 Wn.2d 792, 808, 975 P.2d 967 (1999). The Court explained, “Whether a decision is quasi-judicial in nature depends on whether the decision was adjudicatory in nature. . . . [T]he prosecutor’s decision whether to file charges or to plea bargain is an executive, not adjudicatory, decision.” *Id.* at 809. It continued, “[T]he jury or the judge makes the determination of guilt and the appropriate sentence, not the prosecutor.” *Id.* at 810. Thus, the prosecutor’s sentencing decision was not subject to the appearance of fairness doctrine because that decision did not determine the rights of the defendant.

In *Petersen*, the Court rejected an appearance of fairness challenge to disciplinary hearings, which combined “investigative and adjudicatory functions” conducted by the Certified Professional Guardian Board. 180 Wn.2d at 786. The Court began by assessing whether the hearing was quasi-judicial, noting that prosecutorial proceedings are “exempt from the appearance of fairness doctrine.” *Id.* at 785. Citing to *Carrick*, the Court stated in a footnote that the appearance of fairness doctrine does not apply to prosecutorial proceedings or coroner inquests. *Id.* at 785 n.17. However, because the Board issued recommendations for sanctions against Petersen

(suspending her license as a guardian) and because the proceedings bore some trappings of a trial, the Court conducted an appearance of fairness analysis, rejecting all of the challenges because Petersen had presented no evidence of bias. *Id.* at 786–87.

As the foregoing cases demonstrate, when considering whether the appearance of fairness doctrine applies to executive actions, the Court has focused on whether the decision-maker has the ability to determine the rights of the parties. This emphasis differs from its analysis in cases challenging legislative hearings, or plainly adjudicative proceedings like the one in *Petersen*, where the outcome turns on whether the proceeding was “similar enough to judicial proceedings to warrant the special protections called for by the appearance of fairness doctrine.” *Raynes*, 118 Wn.2d at 243. This difference in focus is not evidence of divergent standards, but instead illustrates two requirements for a quasi-judicial proceeding: (1) the proceeding must be public, and (2) it must adjudicate the rights of the parties thereto.

2. Inquests are not quasi-judicial proceedings because they are purely investigative and the results are nonbinding.

Inquests are purely investigative proceedings, the results of which are not binding on anyone. In *In re Boston*, the Court of Appeals held that the results of a coroner inquest are not subject to direct appeal under the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ). 112 Wn. App. 114, 47 P.3d 956 (2002). In reaching this conclusion, the court rejected the respondents’ contention that the inquest verdict was an appealable “final decision” under RALJ 2.2(a). The court explained,

[A]n inquest verdict is not a “final decision within the meaning of RALJ 2.2(a). Although the RALJ do not define “final decision,” the generally accepted definition limits that term to final judgments or decisions that affect the substantial rights of the parties in litigation ***The [inquest] jury’s verdict does not adjudicate the rights of anyone, nor does it affect anyone’s rights.***

Id. at 121 (emphasis added).

Two years later, the Court of Appeals upheld a King County policy permitting the family of a decedent to participate in inquest, but which did not provide for representation at public expense. *Miranda*, 98 Wn. App. at 903. The court explained:

[O]ur courts have held that our state constitution protects a right of access only in cases in which a controversy is resolved or punishment is determined. In the instant case, ***the proceeding at issue is a nonbinding factual inquiry and does not result in a determination of guilt or responsibility.*** The purpose of an inquest is to determine the identity of the deceased, the cause of death, and the circumstances of death, including an identification of any actors who may be criminally liable. Nevertheless, ***our courts have repeatedly rejected the argument that an inquest is equivalent to a trial.***

Id. (emphasis added).

Courts in other jurisdictions have held the same. In *Zaragoza v. Bennett-Haron*, a Nevada district court considered a due process challenge to a county ordinance establishing procedures in coroner’s inquests related to officer-involved deaths. 828 F. Supp. 2d 1195, 1206–08 (D. Nev. 2011), *vacated as moot* (June 20, 2013). The court concluded that due process protections do not attach to inquest proceedings because the proceedings

do not implicate a life, liberty, or property interest. *Id.* at 1206. The court explained, “The inquest is designed to be an investigatory body, not an adjudicatory or accusatory body. It does not adjudicate any legal rights. . . . Whether to initiate criminal charges following an inquest remains solely within the discretion of the prosecuting authorities.” *Id.* at 1208; *see also Raigosa v. State*, 562 P.2d 1009, 1015 (Wyo. 1977) (“The verdict of a coroner’s jury is merely advisory and has no probative effect.”); *Com. ex rel. Czako v. Maroney*, 412 Pa. 448, 450, 194 A.2d 867 (1963) (“[An inquest] is only a preliminary investigation and not a trial on the merits. Its finding is binding on no one as a judgment.”). As a solely fact-finding function within the Executive Branch, coroner inquests are not properly within the ambit of the appearance of fairness doctrine.

B. The appearance of fairness doctrine does not preclude Inquest Administrators from presiding over inquest proceedings.

The Superior Court correctly acknowledged that the appearance of fairness doctrine applies here only if the inquests are quasi-judicial proceedings. CP at 2427. It erred, however, in its conclusion that coroner inquests are quasi-judicial proceedings to which the doctrine applies. *Id.* As discussed above, the appearance of fairness doctrine does not apply to coroner inquests because they are non-binding executive fact-finding proceedings, the results of which are purely advisory. But even if the doctrine did apply, the conflict of interest cited in *Carrick* is not present here.

1. The Superior Court’s summary analysis ignores this Court’s direction to examine the underlying nature of the proceeding.

Despite the fact that its decision contradicted this Court’s opinion in *Petersen*, the Superior Court devoted just two paragraphs of its 26-page order to its analysis and conclusion that inquest are quasi-judicial proceedings to which the appearance of fairness doctrine applies. The court cited three bases for its conclusion. First, “[t]he Executive Order describes the proceedings as quasi-judicial in nature.” CP 2427. Second, the proceedings appear quasi-judicial because “they occur in a courtroom, presided over by a retired judge, with parties represented by attorneys.” *Id.* Third, citing to *Carrick*, the court stated that “[t]he Supreme Court has previously applied the doctrine to the former version of inquests.” *Id.* A careful reading of this Court’s cases, however, reveals that none of these factors—individually or collectively—supports the Superior Court’s conclusion that the appearance of fairness doctrine applies to coroner inquests.

The fact that the Executive Order describes inquests as quasi-judicial is certainly not dispositive. Indeed, it is merely shorthand to describe the fact that there will be evidence presented in a courtroom under the guidance of a presiding officer for the consideration of a jury. Read in context, the Executive Order is clear that inquests are “reviews into the facts and circumstances” of a death and are not “to determine civil or criminal liability.” CP 1563 (EO App. 1, §§ 2.1, 2.3). Without the additional factor of an “adjudicatory” function, this is no basis for applying the doctrine. Moreover, the Executive cannot trigger the

application of the appearance of fairness doctrine simply by using certain words. This Court has never held that the nature of proceedings can be defined by the legislative or executive official promulgating them. Nothing in the Executive Order suggests that the Executive intended the term to have this effect.

The fact that the proceedings “appear” judicial is likewise not dispositive. This Court has warned that the presence of a public hearing “is not a talisman for invoking the appearance of fairness doctrine” and that its cases “should not be interpreted as indicating that a decision becomes quasi[-]judicial and triggers the appearance of fairness doctrine by the mere fact that a hearing is required by statute.” *Harris*, 98 Wn.2d at 660. Although the *Petersen* decision discussed the trappings of the proceedings, the Court did so in the context of a disciplinary hearing, which was plainly adjudicative. 180 Wn.2d at 785 (noting that the hearing board could impose discipline, suspension, or decertification). *Cf. Tacoma News, Inc. v. Cayce*, 172 Wn.2d 58, 71, 256 P.3d 1179 (2011) (holding that the fact that a deposition was taken in a courtroom and presided over by a judge did not transform the hearing into a judicial proceeding to which the public had a right of access).

The Superior Court therefore erred by concluding that the trappings of a proceeding are, without more, sufficient to render it quasi-judicial. No matter how elaborate the proceeding, it is not quasi-judicial if it *has no impact on the rights of the parties*. “[I]nquest proceedings are purely advisory, inquisitorial functions designed to help the executive

determine the circumstances surrounding a person’s death,” and the outcome does not affect the substantial rights of any participant. *In re Boston*, 112 Wn. App. at 121.

2. This Court’s dicta in *Carrick* does not require the application of the appearance of fairness doctrine to inquest procedures.

The Superior Court erroneously cited *Carrick* for the proposition that this Court had applied the appearance of fairness doctrine to coroner inquests. CP 2391. As discussed above, *Carrick* was largely concerned with whether having district court judges exercise the Executive’s authority over coroner inquests *at the Executive’s request* violated separation of powers rules. *Carrick*, 125 Wn.2d at 134–39. The appearance of fairness challenge actually raised by the parties in that case concerned the prosecutor’s effort to define the scope of the inquiry. *Id.* at 143 n.8. The Court flatly rejected the application of the appearance of fairness doctrine to the prosecutor because the prosecutor was not a “decisionmaker at the inquest” and it was up to the coroner and the jury to decide what evidence they needed to consider in order to fulfill their statutory fact-finding duties. *Id.*

The Court first concluded that the Executive’s request to district court judges to preside over the inquest did not violate the separation of powers doctrine. *Id.* at 134–40. The Court observed that the investigation of untimely and suspicious deaths “involves cooperation between the executive and judicial branches, and thus may be properly undertaken by either branch.” *Id.* at 138. The Court emphasized that, although the

Executive could not compel district court judges to conduct inquests, “voluntary cooperation” was permissible. *Id.* at 139.

The Court next addressed the respondents’ argument that the King County Executive had exceeded the scope of his authority under both RCW 36.24 and the King County Charter by delegating inquest duties to district court judges. *Id.* at 140–43. The Court observed that King County had assigned the duty to conduct coroner’s inquests to the County Executive and that nothing limited further delegation by the Executive. *Id.* at 141. The Court observed that King County Charter § 850 expressly permits delegation to another officer or employee under the Executive’s control, but does not prohibit delegation to other branches. *Id.* at 141–42.

In the course of this discussion of *delegation*, the Court observed that “at least *in the case of an inquest into a death in which county police are involved*, appearance of fairness concerns should dictate that the inquest be held by an official exercising a high degree of independence from the *County Executive, who is ultimately responsible for police conduct.*” *Id.* at 142–43 (emphasis added). Because the Executive was responsible for the Sheriff’s Office at that time, the Court posited that “[a]n inquest conducted by an officer under the direct control of the County Executive could not provide the necessary assurances of impartiality the public expects from an inquest.” *Id.* at 143.

Here the Court was posing a hypothetical situation involving narrow circumstance where the County Executive’s objectivity could be questioned because of ultimate responsibility for both the law enforcement

officer whose conduct was being reviewed and for the supervision of a mythical Executive Branch employee who might be tasked with conducting the inquest. The import of this section of *Carrick* is unclear because the Executive Order at issue in that case provided for district court judges, not executive branch employees, to preside at inquests. Thus, the Court's discussion is, at best, mere dicta. *See Pierce Cty. v. State*, 150 Wn.2d 422, 435 n.8, 78 P.3d 640 (2003) (defining dicta as “[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential” (quoting Black’s Law Dictionary 1100 (7th ed. 1999))); *In re Adoption of B.T.*, 150 Wn.2d 409, 418, 78 P.3d 634 (2003) (declining to follow a definition proposed in a prior decision because it was dicta).

Also notable is the fact that the Court did not explicitly invoke the appearance of fairness doctrine. Perhaps cognizant of the nonbinding, advisory role of inquests, the Court instead cited “appearance of fairness concerns” stemming from the public’s expectations objectivity. *Id.* at 143. The Court did not refer to the doctrine by name or cite any cases applying the doctrine in its discussion. *See id.*

Against this background, the Court’s more recent opinion in *Petersen* is logically consistent and a correct statement of the law. 180 Wn.2d at 785–86 & n.17. Citing to *Carrick*, the Court unequivocally stated that the appearance of fairness doctrine “*does not apply to executive functions* such as prosecutorial inquests or coroner inquests.” *Id.* at 785 n.17 (emphasis added).

The Court’s characterization of coroner inquests as executive functions squares with the prior decisions in *Miranda* and *In re Boston*, which held that coroner inquests are nonbinding investigative proceedings. *See Miranda*, 98 Wn. App. at 902; *In re Boston*, 98 Wn. App. at 903. It also tracks this Court’s repeated refusal to apply the appearance of fairness doctrine where the decision-maker has no power to determine the rights of the parties. *See, e.g., Finch*, 137 Wn.2d at 809–10; *Post*, 118 Wn.2d at 619. Reading these cases together, it is clear that the *Carrick* Court did not intend to suggest that the appearance of fairness doctrine applies to coroner inquests, but instead invoked analogous language to highlight the wisdom of assigning inquest duties to a judiciary official under the particular circumstances presented in that case.

3. The appearance of fairness “concerns” cited in *Carrick* are not presented in this case.

Two years after *Carrick* was decided, the voters in King County decided that the County Sheriff would be a separately elected official, as is the case today. King County Charter § 350.20.040 provides for the Department of Public Safety to be “be administered by the county sheriff who shall perform the duties specified by general law.” The Charter further provides that the County Sheriff shall be separately elected by the voters of the County. *Id.* And the King County Code recognizes that this department is “managed by the King County sheriff.” K.C.C. 2.16.060. Thus, the factual underpinning for the “objectivity” concern alluded to by the Court in *Carrick* simply no longer exists.

The *Carrick* Court acknowledged that King County’s Charter imposes no other restrictions on the Executive’s ability to designate Executive Branch employees to perform duties delegated to him, provided that the Executive “retains ultimate responsibility for the exercise of power or performance of the delegated duty.” *Id.* at 142. The Court further observed that “[e]ven were the inquest to be conducted by an executive officer, rather than a district court judge, the King County Executive could retain little more responsibility, as RCW Chapter 36.24 places certain independent and mandatory duties on whoever is conducting the inquest.” *Id.*

The Superior Court’s application of *Carrick* to this matter is inapposite for several reasons. First, the court ignored the practical problem faced by the Executive. While the executive order in *Carrick* vested the authority to preside over inquests in District Court Judges, such a delegation was not possible when the current Executive Order was drafted. In 2018, the District Court Judges declined to preside over inquests. CP 1528. As noted in *Carrick*, the Executive cannot compel the District Court’s cooperation. 125 Wn.2d at 138–39. Another solution for designating a presiding officer was needed, and the Executive properly exercised policy-making discretion in deciding how to resolve that issue after considering extensive input from the community.

Nor do decisions to amend the Executive Order render the policy-making subject to invalidation under the appearance of fairness doctrine. Whether the presider is a District Court Judge or an Executive Branch

employee administrator, the authority being exercised is the same: the coroner's authority, which resides with the Executive. ⁶As the Court of Appeals correctly observed in *In re Boston*, a “judge who conducts an inquest stands in the shoes of the county coroner or county executive.” 112 Wn. App. at 117. The same is true of the Inquest Administrators serving as the Executive's designees under the Executive Order.

The Superior Court cited the Executive's amendment of the Executive Order in response to a ruling by Administrator Spearman as evidence of a structural conflict of interest and a “disregard” for the Inquest Administrator's independence, which the court concluded arose from the assignment of inquest powers to an Executive Branch employee. CP 2428. This conclusion does not follow, for the Executive is—and always has been—free to amend procedures relating to inquests. Such amendment would be equally possible if the inquest authority were being exercised by District Court Judges or any other presiding officer. The Executive's exercise of the coroner authority to administer inquests and establish procedures for them is simply not evidence of a conflict of interest or bias.

C. Coroners have broad discretion in deciding the scope of the inquest.

Whether to commence an inquest at all is left to the discretion of the official exercising the coroner's inquest authority—in this case, the Executive. RCW 36.24.020 (“Any coroner, in his or her discretion, may

⁶ The Executive's Brief discusses in detail how the King County Charter allocates the coroner's authority to the Executive. Administrator Spearman joins in that argument.

hold an inquest if”). Likewise, the presiding officer at an inquest has broad authority to determine the scope of the inquiry in that proceeding: “[I]t is for the judge and jury alone to decide what matters must be properly inquired into in order to fulfill their statutory duty” under RCW 36.24.050. *Carrick*, 125 Wn.2d at 144 n.9.

The Superior Court recognized that courts cannot use writs to tell the Executive what must or cannot be in the policy about how inquests will proceed. CP 2418–20. Nevertheless, under the guise of applying the appearance of fairness doctrine and review of the Executive’s “ultra vires” policymaking, the court prohibited the Executive from including certain topics in the scope of the inquest inquiry and dictated whether certain types of witnesses could be called and what kind of testimony they might present. *See* CP 2423–35. In so doing, the Superior Court wrongfully intruded on the province of the coroner and inquest jury. These errors present another compelling reason to reverse the Order and vacate the injunction.

1. The coroner may properly conclude that an involved officer’s training and agency policy are relevant inquiries.

The Superior Court enjoined the Inquest Administrators from admitting evidence or witness testimony regarding the involved officers’ “training and policy.” CP 2434. The court reasoned that the Coroner’s Statute is “specifically designed to determine ‘who died, what was the cause of death, and what were the circumstances surrounding the death, including the identification of any actors who may be criminally liable for the death.’” CP 2344 (quoting *BNSF Railway Co. v. Clark*, 192 Wn.2d

832, 838, 434 P.3d 50 (2019)). The court concluded that “the life and/or job experience of those involved in the incident” and “whether an officer acted in compliance with policy” are “not within that factual panoply.” CP 2344 That conclusion is wrong for at least two reasons.

First, it is directly at odds with the policy-making and procedures followed by King County Executives for decades. As explained above and in the Executive’s Statement of the Case, inquests have consistently included training and policy evidence. These factors can easily be understood as part of the “circumstances surrounding the death.” The determination of the scope of the inquiry is within the discretion of the coroner, and the Superior Court cannot enjoin the exercise of that discretion simply because a different conclusion is possible.

Second, this Court has never purported to limit or dictate the scope of an inquiry. The Court’s decision in *BNSF*, the case upon which the Superior Court apparently relied, contains no such holding. 192 Wn.2d 832. Rather, this Court has held that the King County Executive may fill gaps in the statute so long as they do not create any direct conflict with the Coroner’s Statute: “Clearly, when the statute and the executive order contain different, but not conflicting requirements, the person conducting the inquests must comply with both requirements.” *Carrick*, 125 Wn.2d at 144.

2. The admissibility of lay and expert witnesses is within the coroner’s discretion.

The Superior Court broadly enjoined the Executive from allowing “testimony or evidence from outside expert witnesses who were not

involved in the underlying law enforcement investigation into the death.” CP 2434. The court reasoned that the Executive Order “invites speculation regarding policy and training” by prohibiting the chief law enforcement officer of the involved agency from opining as to whether the involved officer acted according to policy while permitting expert testimony on the same. CP 2433–34. Not only is this holding based on a faulty premise, it once again improperly invades the coroner’s discretion to decide what evidence and testimony is relevant to the inquest inquiry and to exclude evidence and testimony that is not. Notably, elsewhere in the Order, the Superior Court acknowledges that the Inquest Administrator is in the “best position” to decide these questions:

As to calling witnesses that decision is left to the administrator. The administrator is in the best position to determine to what degree and inquest review should expand—whether calling outside experts or permitting prior disciplinary history to be brought before the jury although these areas of inquiry appear to be outside the scope and purpose of an inquest proceeding.

CP 2434–35.

The Superior Court erroneously concluded that the Executive Order requires the inquest jury to “guess” as to whether the involved officer followed applicable training and policy “from a position of utter ignorance.” CP 2433. While the Executive Order prohibits the chief law enforcement officer from the involved agency from testifying as to whether the officer acted pursuant to agency policy, it does not bar all testimony on the matter. The Executive Order permits expert testimony, presented by either party, on that subject. *See* CP 1524 (EO App. 2,

§ 12.1) (“Each party . . . may proffer its own witnesses to provide testimony that aids the panel in the understanding of the facts, including factual areas of experts . . .”). Contrary to the Superior Court’s assumption, then, the Executive Order does not limit the availability of experts to just the families of the decedents.⁷ Involved agencies are equally permitted to enlist expert testimony on the officer’s compliance with agency policy if the Inquest Administrator determines that testimony is properly within the scope of the inquest.

The Coroner’s Statute requires the inquest jury to hear “all the evidence concerning the death,” RCW 36.24.020, and gives the coroner discretion to determine which witnesses have “knowledge of the facts,” RCW 36.24.050. It is therefore squarely within the coroner’s statutorily granted power to determine which witnesses have relevant knowledge and which ones do not. The coroner may reasonably conclude that the chief of the involved law enforcement agency would not present neutral, unbiased testimony on the issue of the involved officer’s compliance with agency policy. The coroner may likewise conclude that expert testimony on those issues would facilitate the jurors’ understanding on certain matters. Nothing in the Coroner’s Statute prohibits this kind of testimony.

⁷ The Executive Order also prohibits testimony regarding changes that should be made to existing policy, procedure, and training. CP 1524 (EO App. 2, § 12.2). Thus, while the Superior Court described the Executive Order as “one-sided” and “Kafkaesque,” CP 2392, the limitations it places on testimony regarding policy and training cut both ways.

D. The Superior Court erred in ruling that the Executive lacks the authority to obtain subpoenas compelling testimony or document production *before* an inquest hearing.

In a November 5, 2019 pre-hearing conference order in the Butts Inquest, Administrator Spearman ordered that the pre-hearing depositions of two Seattle Police Department detectives occur. CP 184. No subpoenas were requested or issued in that proceeding, however, because the officers voluntarily made themselves available for an interview. CP 1863. Nonetheless, the Superior Court addressed the issue of the Inquest Administrator's authority to issue pre-hearing subpoenas under RCW 36.24.200, holding that no such authority existed because it resided with the office of the medical examiner under the King County Code.

A proper reading of the Coroner's Statute and the King County Code shows that the Executive, and his designees, retain the statutory power to issue or obtain subpoenas in inquests. Accordingly, Superior Court's conclusion that only the King County Medical Examiner can issue pre-hearing subpoenas is wrong and should be reversed.

1. The Coroner's Statute, as amended in 2019, grants coroners the authority to compel testimony and document production *before* an inquest hearing.⁸

The Superior Court erroneously concluded that, in King County,

⁸ The Superior Court could have declined to rule on this issue because (1) as noted above, no subpoenas had been requested as of the time the pending inquests were stayed, so no justiciable dispute existed and (2) RCW 36.24.200 provides for proceedings before the Superior Court in connection with the issuance of subpoenas for pre-hearing, so an alternative adequate remedy is available. *See Thompson v. Wilson*, 142 Wn. App. 803, 819, 175 P.3d 1149 (2008) (holding that declaratory judgment regarding a coroner's cause of death determination was inappropriate because review was available under RCW 68.50.015). In the interest of efficiently resolving all of the disputes presented below and clearing the way for the resumption of inquests, Administrator Spearman urges the Court to resolve this issue on the merits.

only the office of the Medical Examiner has pre-inquest hearing discovery power. CP 2426–27. In reaching its conclusion, the Superior Court cited to King County Code 2.35A.090(E), which authorizes the Chief Medical Examiner to issue subpoenas to compel the production of “documents [that] are necessary for the full investigation of any case under the jurisdiction of the medical examiner.” K.C.C. 2.35A.090(E)(1). The Superior Court’s analysis is flawed, however, because it glosses over provisions in other subsections of the Code and assumes that the King County Code is the *only* source of authority from which the Executive’s subpoena power could derive. It ignores the power given to the Executive through the Charter, Code, and Coroner’s Statute, including the subpoena powers under RCW 36.24.200.

The Coroner’s Statute addresses a coroner’s subpoena power in two places—section .050 and section .200. In *BNSF*, the Court ruled that section .050 does not give the coroner authority to issue any subpoenas until a jury has been requested. 192 Wn.2d at 837–38. In that case, no jury had been requested, so the Court concluded that the Medical Examiner lacked any subpoena power at all in connection with the inquest. *Id.* at 840. The Court further concluded that the coroner’s power under section .050 is limited to requiring the appearance of witnesses and the production of documents at the actual inquest hearing. *Id.* at 844–46.

Following the *BNSF* decision, the Legislature *added* a new section to the Coroner’s Statute, RCW 36.24.200, which grants the coroner

additional authority to request subpoenas compelling testimony or document production at a time and place designated by the coroner:

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 the 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 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 may be joined with a subpoena for testimony, or it may be issued separately.

The Superior Court seemed to acknowledge that the subpoena power granted in .200 was in addition to the authority granted to a coroner in .050. CP 2425 (“This is distinct form [sic] that authority to subpoena witnesses to attend the inquest hearing itself.”). Without analysis or explanation, the Superior Court concluded that RCW 36.24.200 applies only when “no legal proceeding, such as an inquest, is pending.” CP 2426. But the record before the Superior Court was clear that the inquest had been commenced within the meaning of *BNSF* because the Executive had previously requested the Superior Court to provide both facilities and a jury. *See* CP 1555–60.

The court’s ruling conflicts with the plain language of the statute, which specifically states that the pre-hearing subpoena power applies “in addition to” the coroner’s previously existing authority under section .050. The statute does not exclude a pending inquest from the term “a pending or ongoing death investigation”—that is exactly what an inquest is. The Superior Court’s interpretation incorrectly imposes a limitation on the

language that simply does not exist. *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010) (“[W]e look first to the plain meaning of the statutory language, and we interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous.”). If the Legislature intended section .200 to apply instead of, rather than “in addition to,” the powers under .050, it would have so stated.

2. The King County Code does not limit subpoena power to the Medical Examiner.

As explained in more detail in the Executive’s Brief, King County has vested the coroner’s inquest powers in the Executive. Careful review of the relevant provisions of the King County Code makes clear that the power to conduct inquests, and any statutory powers attendant thereto, resides with the Executive. *See* K.C.C. 2.35A.090(B) (authorizing the medical examiner to “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*” (emphasis added)); K.C.C. 2.35A.090(C) (authorizing the medical examiner to “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)).

Moreover, King County Code 2.35A.090(E), which authorizes the Medical Examiner to issue document subpoenas, does not commit the subpoena power *solely* to the Medical Examiner. It limits the Medical

Examiner's subpoena authority to "case[s] under the jurisdiction of the medical examiner." K.C.C. 2.35A.090(E)(1). The Executive therefore remains free to exercise the subpoena power under RCW 36.24.200 in the cases—coroner's inquests—under its jurisdiction.

In the Butts Inquest, Administrator Spearman had subpoena power under both .050 *and* .200. Because a jury had been requested by the Executive, the inquest had commenced, giving Administrator Spearman the power to issue subpoenas compelling testimony and production of documents at the inquest hearing. Under section .200, Administrator Spearman also had authority to request the Superior Court to issue pre-inquest hearing subpoenas. Thus, if Administrator Spearman had ordered the pro-tem attorney to request such a subpoena—which was not required in this case—it would have been well within his powers to do so.

In sum, because the Executive retains the coroner's statutory inquest powers and RCW 36.24.200 authorizes coroners to request the issuance of pre-inquest subpoenas, the Executive—or his designee—has the power to issue pre-hearing subpoenas in the course of an inquest. The Superior Court's conclusion to the contrary contradicts the statute's plain language and misunderstands the allocation of power between the Medical Examiner and Executive in King County. The Superior Court's order on this point should therefore be reversed.

E. The process by which inquest proceedings are made available to the public is a discretionary policy decision for the Executive or his or her designee.

Although the Superior Court did not address the issue, the Executive's authority to prescribe procedures for inquest proceedings includes procedures for media access. *See Carrick*, 125 Wn.2d at 144 (holding that the Executive can mandate additional steps in an inquest proceeding so long as they do not contradict with the statute).

Administrator Spearman's amended media order was entirely consistent with that provision of the Executive Order and should be upheld.

Public access to government proceedings is a fundamental principle in Washington. *See, e.g., Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (observing that access to government is one "of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions"); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37–39, 640 P.2d 716 (1982); *Cohen v. Everett City Council*, 85 Wn.2d 385, 388, 535 P.2d 801 (1975) (holding Article 1, section 10 of the Washington State Constitution "entitles the public, and . . . the press [as] part of that public, to openly administered justice").

Accordingly, recording, filming, and even live streaming are commonplace in many government proceedings. *See, e.g., TVW.org*, <https://www.tvw.org/> (executive and legislative coverage available on television and internet); Washington State Supreme Court, *Washington State Supreme Court Calendar*, [courts.wa.gov](https://www.courts.wa.gov), https://www.courts.wa.gov/appellate_trial_courts/supreme/calendar/ (last

visited Sept. 26, 2020). Similar methods are likewise employed in federal government proceedings. *See* Ninth Circuit Court of Appeals, *Live Video Streaming of Oral Arguments and Events*, [ca9.uscourts.gov](https://www.ca9.uscourts.gov), https://www.ca9.uscourts.gov/media/live_oral_arguments.php (last visited Sept. 26, 2020); United States Congress, *Audio and Visual Coverage*, [congress.gov](https://www.congress.gov), (last visited Sept. 26, 2020).

The Executive Order acknowledges the public’s strong interest in the information provided during a coroner inquest by directing the Inquest Administrators to “make the proceedings available to the public and to the media.” CP 1565 (EO App. 1, § 6.2). The Executive Order further mandates that procedures governing media access must be consistent with the long-standing and familiar guidance provided to trial courts under Washington General Rule 16. CP 1571 (EO App. 2, § 10). The Executive Order vests the Inquest Administrators with discretion to oversee media coverage and limit access to particular sensitive exhibits or testimony as needed. CP 1568, 1570–71 (EO App. 2, §§ 10, 3.3).

Inquest Administrator Spearman’s Amended Media Order Governing Camera Recording Devices, CP 1869–71, properly balanced the public’s interest in disclosure and transparency with the privacy interests of the involved officers and family members. The Amended Media Order contemplates the exercise of discretion regarding media access to particularly sensitive materials by reserving the administrator’s authority to direct media not to photograph, video, livestream or record certain witnesses, participants, or exhibits. CP 1870. More generally, the Amended Media Order provides

that “[a]ll media representatives who operate cameras or recording devices are subject to the continuing supervision of the Inquest Administrator.” CP 1871. The order also provides specific safeguards to protect the identities of inquest jurors and to maintain the confidentiality of lawyer/client communications. CP 1870–71.

The process set out under GR 16 and the Amended Media Order gives the interested parties a full and fair opportunity to contest the publication of particularly sensitive information at the time of the hearing. This enables the Inquest Administrator to assess the request in the context of the inquest proceedings and fashion an appropriate remedy. Because the Inquest Administrators must make a record of the reasons supporting a decision to prohibit the publication of certain information, the public’s interest in transparency remains intact. For all these reasons, any challenge to Administrator Spearman’s Amended Media Order should be rejected.

V. CONCLUSION

Coroner inquests are purely executive fact-finding proceedings. While inquests provide important information and a public forum through which to air the facts surrounding a death, the verdict of the inquest jury does not adjudicate the rights of anyone. The procedural means by which the inquests are carried out are properly committed to the discretion of the Executive in the exercise of the coroner’s authority, and the scope of the inquiry—including topics and witnesses to be considered—is within the discretion of the officer presiding over the hearing.

As the process for community input on revisions to the Executive Order in this case demonstrates, there are nonjudicial means by which constituents may voice their concerns and influence changes to the inquest proceedings. The appearance of fairness doctrine is not a back-door channel to subject the decisions of the Executive and his designees to judicial review. This Court should reaffirm the separation of powers principles underpinning our system of government and reverse the Superior Court's improper substitution its views on these issues for those adopted by the Executive and Inquest Administrator.

Respectfully submitted this 1st day of October, 2020.

FOSTER GARVEY PC

By */s Tim J. Filer*

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/s Asti Gallina

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served in the manner noted copies of the foregoing document upon the designated parties as shown below:

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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.

Executed on October 1, 2020, at Seattle, Washington.

Jan Howell

Jan Howell

FOSTER GARVEY PC

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