IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

THE FAMILY OF DAMARIUS BUTTS, by and through his mother, Ann Butts, Plaintiff/Petitioner, v. DOW CONSTANTINE, in his official capacity as King County Executive, MICHAEL SPEARMAN, in his official capacity as King County Inquest Administrator, Defendants/Respondents.	No. 20-2-01420-6 SEA ORDER ON REQUEST FOR WRITS OF MANDAMUS AND OTHER RELIEF Consolidated Matters: No. 20-2-01455-9 SEA; No. 20-2-02220-9 SEA; No. 20-2-01420-6 SEA; No. 20-2-01413-3 SEA.

These matters came before the court requesting writs of mandamus, prohibition, review, declaratory judgment, injunctive relief, and a finding that the King County Executive, Dow Constantine acted *ultra vires* when he exceeded his authority under the Coroner's Act. Specifically, the families of the slain individuals ("families") brought writs of mandamus individually in four different matters: 20-2-01455-9, 20-2-02220-9, and 20-2-01413-3. The four lawsuits were consolidated into 20-2-01420-6. Various police agencies and individual law enforcement officers intervened by agreement in early 2020. The City of Seattle and Seattle Police Department dismissed their lawsuit prior to oral arguments that were heard on July 17, 2020. The families ask this court to issue writs of mandamus to require the King County

JUDGE JULIE SPECTOR
KING COUNTY SUPERIOR COURT
516 THIRD AVENUE
SEATTLE, WASHINGTON 98104
TELEPHONE: (206) 477-1342

Executive to re-write the inquest procedures. Specifically, their writs ask that the administrator of an inquest issue subpoenas, compel the officer(s) to testify, allow outside experts to testify about training and policies and compliance therewith, and ask the jury to consider whether a crime was committed and whether the individual officers are criminally liable. The remaining intervening police agencies and police officers ask that writs of prohibition and review issue along with declaratory judgment and injunctive relief in their favor.

The King County Executive issued three orders on October 3, 2018, which significantly changed the inquest proceedings. An amendment was made on December 4, 2019 and another on June 11, 2020 the day before briefing was due in the matters before the court.

The Coroner's Act, initially enacted in Washington Teerritory in 1854, is now codified under RCW 36.24 *et seq wa*. This Act remains in place today but the coroner in King County now refers to the Medical Examiner as the inquest proceedings have been implemented in King County and the legislature has so delegated. The county coroner is authorized to conduct autopsies, death investigations and conduct inquests. An inquest is an investigative fact finding conducted by the executive branch. *Carrick v. Locke*, 125 Wn.2d 129, 882 P.2d 173 (1994). RCW 36.24.040; see also, *BNSF Ry. Co. v. Clark*, 192 Wn.2d 832, 837-38 (2019). The statute and interpretive caselaw establish that an inquest is not a trial or a judicial proceeding; it is an executive function. In addition, an inquest cannot be appealed nor does it set precedent. The Washington State Supreme Court recognized that "[a] coroner's inquest is not a culpability-finding proceeding." *State v. Ogle*, 78 Wn2d 86, 88 (1970); *Carrick*, 125 Wn2d 133. Inquests are authorized by RCW 36.24 *et seq*., which sets out the inquest duties of a county coroner. In King County, this duty lies with the Medical Examiner as part of the Executive function of

JUDGE JULIE SPECTOR
KING COUNTY SUPERIOR COURT
516 THIRD AVENUE
SEATTLE, WASHINGTON 98104
TELEPHONE: (206) 477-1342

government. See generally, King County Code 2.35A.090.B. The statute allows a Medical Examiner to request a jury as well as authorize the request to issue subpoenas. RCW 36.24.070. After hearing evidence, the inquest jury determines the cause of death, the identity of the individual killed, when and where the death occurred and the means of death. The jury may identify the responsible party. *Id.*

The County Council initially possesses all general law powers because King County is a "home rule" county. These powers are traditionally considered to be "executive" or "administrative", unless and until the County Council delegates them by ordinance or the charter as specifically does. Under the twenty first amendment to the State Constitution it provides in § 4:

> 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 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.

WASH. CONST., Art. XI, Sect. 4. This grants the King County council broad power that "provides that all responsibilities placed on county officials by general statutes will accrue to the county legislative authority in a home rule county." *Carrick v. Locke*, *Id.* at 141. The Coroner's Act falls into this category. One of the issues raised by the Intervenors (only police agencies remain after Seattle dismissed its lawsuit on June 11, 2020) is whether those general powers under the Coroner's Act were transferred to the Executive, the Medical Examiner, or to neither position. A transfer could only occur by way of the charter or by a county ordinance.

Under the Coroner's Act, the Executive was given a partial grant of authority. The County Council adopted an ordinance granting authority to the Department of Public Health, Ch. 2.35A KCC. Specifically, under KCC 2.35A.090 the duties of the Medical Examiner are to be performed by the Prevention Division of the Department of Public Health. "The medical examiner shall be responsible for the administration and staffing of all programs relating to the performance of autopsies and investigations of death as authorized by the statues of the state of Washington, except as provided by this section."

The Medical Examiner was granted all powers under the Coroner's Act with one exception – inquests.

> 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 [Burial, cremation or other disposition].

KCC 2.35A.090B (emphasis added).

Because the King County Code did not delegate any other power, the Executive has no additional authority under the enabling legislation at issue unless it derives from the Charter. The Charter did not create an office of Coroner, nor of medical examiner. The Charter states clearly that the Department of Public Health "shall perform autopsies," Charter Section 920.20.30, and that "[a]n inquest shall be held" in certain cases. *Id.* at Sect. 895. The Charter remains silent as to who will perform the inquest and what procedure shall be employed.

The Executive claims that the Charter vested in his office all executive powers of the county, including those in the Coroner's Act. Specifically, he relies upon:

JUDGE JULIE SPECTOR
KING COUNTY SUPERIOR COURT
516 THIRD AVENUE
SEATTLE, WASHINGTON 98104
TELEPHONE: (206) 477-1342

> 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 have the power to assign duties to administrative offices and executive departments which are not specifically assigned by this charter or ordinance…[1]

King County Charter, 320.20 (emphasis added).

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.

Charter provision 320.20 describes the general powers of the Executive. It recognizes that a delegation of any power through the charter must be "expressly vested" in another officer. To accept such a broad delegation of every power known to exist, by this single section, is inconsistent with the underlying basis for home rule counties – the thoughtful organization of county government to fit the desires of its residents.

As one commentator wrote, "home rule is both a political concept and a legal concept. As a political concept, it focuses on the allocation to local residents of policy choices about any combination of (1) the structure of local government; (2) what regulatory activities the local government engages in or what public services it provides; and (3) strong local control over carrying out the allocated functions." Hugh Spitzer, "Home Rule" vs. "Dillon's Rule" for Washington Cities, 38 Seattle U.L. Rev. 809, 820 (2015).

[1] This Charter provision is 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. *Compare*, WASH. CONST., Art. XI, §4 ("not expressly vested in specific officers by the charter"); *with*, Charter 320.20 ("not expressly vested in other specific elective officers by this charter").

The charter provides that the Council "shall have the power to establish, abolish, combine and divide administrative offices and executive departments and to establish their powers and responsibilities[.]" Charter §220.20. If the Executive's position is accepted, it would render the Council's authority over the executive offices meaningless as the Council would, in effect, strip itself of all of its constitutionally granted authority by this generic policy statement. The Executive claims that in enacting these orders, he possesses each and every power set forth in the general laws, even though the residents never delegated to him such sweeping authority. Moreover, there is no clear mandate that the County Council has agreed to such a broad delegation of authority to the office of Executive. The powers and authority to the County Executives derive from either a general statute, county charter or a county code.

The delegation from a county legislative body to an executive office must be specific, not general. In rejecting a similar argument made by the Executive here, the Supreme Court noted "it solves no problem merely to say that since the charter vests all executive powers in the executive branch, the county council possesses no administrative powers." *Durocher v. King Cty.*, 80 Wn.2d 139, 150, 492 P.2d 547 (1972). In fact, the County Council retains all powers not expressly granted by ordinance or charter. The Supreme Court held: "[I]t will be noted that the right to assign or delegate that power is given solely to the legislative branch. Thus, unless assigned or delegated by it, the power remains with the board [of county commissioners.]" *Id.*, at 146.

An executive official "cannot create obligations, responsibilities, conditions or processes having the force and effect of law merely by issuing an executive order." *Fischer-McReynolds v.*

Quasim, 101 Wn. App. 801, 812-13, 6 P.3d 30, *as amended*, (2000) (an executive order that is not based on a legislative grant of authority "lacks the force and effect of law").

In December 2017 the King County Executive suspended all inquests after the slaying of Charleena Lyles in June. He created a committee involving community leaders to determine the method to be utilized going forward in all inquest proceedings. Almost a year later in October 2018 after receiving input through the Inquest Review Committee, the Executive promulgated his first order revising the inquest proceedings. As a result, King County District Court judges no longer would preside over inquest proceedings, as they previously had. A manager would assign an administrator to preside over the proceeding. The 2018 Executive Order (hereinafter "EO") eliminated the prosecutor's role; instead, this was given to a *pro tem* attorney with authority to issue subpoenas at the request of the administrator. The 2018 EO further allowed the chief law enforcement officer of the involved agency to provide testimony regarding applicable law enforcement agency training and policy as they relate to the death. See §12.3 However, the chief law enforcement officer or director could not provide an opinion as to whether the involved law enforcement officer(s) complied with the policy or training. Instead, the jury was to make that determination.

Retired Judge Michael Spearman was assigned as the "administrator" in the Butts' inquest (the case of consolidation). Initially, Administrator Spearman allowed the involved law enforcement officers to determine whether they would testify at the inquest proceedings. The Executive amended his original 2018 order on December 4, 2019 requiring law enforcement to testify, if the officer wanted his/her counsel to participate. See §2.2. This essentially overruled Administrator Spearman's pre-inquest ruling, eroding his independence. This second Executive

Order placed the involved law enforcement officers on a collision course with both their 5th and 6th Amendment rights based on this last-minute change by the Executive. As a result of this second Executive Order, a police officer involved in a shooting would be required to testify if s/he wanted to have counsel represent him or her at the inquest. Simultaneously, it effectively overruled Administrator Spearman's pre-inquest ruling. As a consequence, a police officer's rights under the 5th Amendment to testify, or to decline to do so, were being leveraged against their 6th Amendment right to counsel. Then, on June 11, 2020 the day before all briefing was due to be filed with this court, the Executive once again changed the rules of the inquest proceedings by allowing subpoenas to issue and reversed course on law enforcement's right to counsel. This mooted several of the issues pending before the court.

By this point, the law enforcement agencies and the involved officers had intervened by agreement. They too filed writs of review, prohibition, injunctive relief, declaratory judgment and a request that this court find that the Executive had exceeded his authority by expanding the scope of an inquest proceeding and that he had acted *ultra vires*. It is not in dispute that many of the Executive's decisions regarding the scope of inquest proceedings have expanded. The Executive's last- minute changes on the eve of an inquest and prior to this court hearing argument on the merits of the writs and other relief were an apparent attempt to balance competing interests – those of the families of the decedents and those of the intervening law enforcement agencies. Under established law, these decisions were discretionary acts and political decisions and therefore not susceptible to a writ of mandamus or prohibition or review.

Courts have found that a writ of mandamus or prohibition may not interfere with a municipality's legislative functions and such interference by the judiciary constitutes a violation

of the separation of powers. Taken to the next logical step, the same holds true for the judiciary's interference with executive functions; here, the Executive's three orders. See generally, *Eugster v. Spokane*, 118 Wn.App. 383, 407-08 (2003) and *Walker v. Munro*, 124 Wn2d 402, 407 (1994). A writ of mandamus cannot be utilized to compel Executive Constantine to re-write the inquest procedures that are discretionary and policy-driven decisions. See *Colvin et al. v. Inslee et al.*, ___ P.3d ___, 2020 WL 4211571 (7/23/2020). "Because a writ of mandamus can require only what the law requires, mandamus cannot control the discretion that the law entrusts to an official." *Id.*, citing, *SEIU healthcare 775 NW v. Gregoire*, 168 Wn.2d 593, 599, 229 P.3d 774 (2010). When would a writ of mandamus issue?

A writ of mandamus issues when there is ministerial duty owed or a non-discretionary act required by law. For example, during an election if the Secretary of State refused to certify an election after the votes were tallied and the outcome was obvious, but because of whatever political decision the Secretary of State refused to certify an election's outcome, then a writ of mandamus would issue. See generally, *Marbury v. Madison*, 1 Cranch 137 (1803), 5 U.S. 137, 1803 WL 893.

Likewise, a writ of review cannot issue in this case. Under RCW 7.16.040 a writ of review does not provide for the ability to challenge an Executive order. A writ of review is a challenge to a judicial function (usually from a lower court or tribunal). The inquest proceeding or the policy that guides them is not a judicial function; rather, the Executive's policy decisions are executive functions as is an inquest in its pure form. The three orders of the King County Executive are executive in nature and involve discretionary acts. Therefore, the Executive's policy decisions in his Executive Order(s) are not susceptible to a writ of mandamus, review or

prohibition. As a result of the Executive Orders issued in 2018-2020, an inquest proceeding is no longer presided over by a judge; there is no ability to appeal nor does an inquest proceeding provide precedent. Last minute policy-driven decisions encapsulated in an Executive order is not open to a writ of mandamus, or a writ of review or a writ of prohibition. *Colvin et al., v. Inslee*, et al., __P.3d __ 2020 WL 4211571 (7/23/2020); *Kerr-Belmark Const. Co. v. City Council of City of Marysville*, 36 Wn.App. 370, 371-72 (1984); *Williams v. Seattle School District No. 1*, 97 Wn2d 215, 218-19 (1982).

The Executive recognizes that what remains as a viable challenge to his orders is a declaratory judgment. What always remains is a constitutional challenge to any Executive order. The Executive argues that all of the parties to these lawsuits do not have standing to challenge the policy decisions he made concerning inquest proceedings. Simultaneously, one of his policy decisions was to provide legal counsel to the families of the slain individual at public expense. It is incongruous that while the Executive acknowledges a family's need to be represented during an inquest proceeding, yet he somehow claims in the same proceeding that the family does not have legal standing to challenge his decisions nor do the involved officers have standing whose civil and criminal liability are being exposed through this fact-finding proceeding. Although one might question the Executive's last minute reversal on policy, or concerns of constitutional infirmities in his initial policies, it is not the role of this court to mandate what the Executive could or should do with discretionary policies, so long as they pass constitutional muster.

As stated above, a writ cannot issue for this equivocal policy-making approach the Executive has employed to conduct inquest proceedings nor can a writ dictate what questions will be asked of an inquest jury, such as those pertaining to criminal liability. Simply stated, a

writ cannot compel an Executive to re-write his procedures in an inquest proceeding. Nor does the Executive's decisions to allow subpoenas, discovery or allow experts to testify outside of the fact-finding fall under a mandatory or non-discretionary act. These discretionary decisions along with assigning counsel to the families fall squarely within the Executive's authority, no matter how equivocal they have played out in the last two years. They are not mandatory or non-discretionary. *Brown v. Owen*, 165 Wn2d 706, 725 (2009). Nor do his decisions violate the Supremacy Clause of the state constitution as argued in the Butts' application for a writ of mandamus. These are policy decisions; they are not mandatory and therefore, not susceptible to any writ whether it be mandamus, prohibition or review. RCWs 7.16 (Prohibition), 7.16.040 (Review). However, the Executive has conceded that the issue of a declaratory judgment remains as a viable challenge his Executive Orders.

This court finds that the law enforcement officers and their agencies have standing as do the families of the slain individuals to challenge the inquest proceedings under the Uniform Declaratory Judgment Act. RCW 7.24.010. The Coroner's Act that proscribes inquest proceedings is codified under RCW 36.24.070. It holds:

> "After hearing the testimony, the jury shall render its verdict and certify the same in writing signed by the jurors, and setting forth who the person killed is, if known, and when, where by what means he or she came to his or her death; or if he or she was killed, or his or her death was occasioned by the act of another by criminal means, who is guilty thereof, if known."

There was never any intent of an inquest proceeding to determine civil or criminal liability. *Carrick v. Locke*, 125 Wn.2d 129, 134 (1994). As the Coroner's Act was modified by the Legislature over the last 166 years, very little changed, except in King County. The Coroner is now referred to as the Medical Examiner in King County. The scope of the inquest jury review

of evidence involves "who" died, "when," "where," and "by what means" the individual died. *Id.* The additional questions the Executive has permitted and the additional discovery allowed before the inquest expands the scope of a reviewing jury. Obviously, in all modern inquests (in the last 50 years) the involved officers are known and the means are also known, as is the decedent's identity and how s/he came to his/her death. The Executive's three orders now injects the training and policies of that particular law enforcement agency into the proceeding. However, the Executive has barred the chief of a law enforcement agency or anyone from the agency to opine whether policy and training were complied with by the involved law enforcement officer(s). Ironically, the Executive Order permits the family to call outside experts to opine outside of the fact-finding to testify to this one-sided issue. Similarly binding, the Executive prevents law enforcement from arguing self-defense. So, when only one-sided information is provided to the inquest jury, one must query as to the fairness of this proceeding that represents a Kafkaesque situation, whereby the involved law enforcement officer(s) cannot raise the defense of self-defense nor have a supervisor or chief of police testify that the involved officer complied with policy and training. How is that fair? The families understandably see nothing wrong with this expanded inquiry and the limitations placed on law enforcement. In fact, the families want to go farther. They want a jury to make a finding whether a crime was committed. This argument is not what inquest proceedings were ever intended to encompass. The families' positions cite to no law that supports their request for a writ of mandamus requiring the Executive to revise his policy decisions or the questions put to inquest juries. *Carrick v. Locke, supra., Colvin et al., v. Inslee, et al., supra.*

In so far as standing is concerned, the families and law enforcement do have standing to challenge the Executive's three orders.

The court finds that law enforcement (intervenors) are entitled to injunctive relief in accordance with RCW 7.40.020. One who seeks relief by temporary or permanent injunction must show 1) that he has a clear legal or equitable right, 2) that he has a well-grounded fear of immediate invasion of that right, and 3) that the acts complained of are either resulting in or will result in actual and substantial injury to him. *Tyler Pipe Indus., Inc. v. Department of Rev.,* 96 Wn.2d 785, 638 P.2d 1213 (1982). Each individual law enforcement officer is party to an inquest that has been assigned to an administrator and convened. *Miranda v. Sims*, 98 Wn.App. 898, 991 P.2d 681, 687 (2000). The court in *Miranda* held that law enforcement officers have a fundamentally different interest in "participating" by way of representative counsel in inquest proceedings because they have the potential to be held civilly or criminally liable. *Id.*, 908-09. The law enforcement officers and agencies show they can individually be harmed as will the agency that employs him or her. The Executive Order requires participation of the "employing government department," and its "chief law enforcement officer must provide testimony." The Executive Orders require the law enforcement agencies to provide discovery in the form of officer discipline, training records, policy manuals, and any personnel investigations. This directly affects the involved law enforcement officers and the agency. The inquest jury is now being required to answer not only the cause and manner of death, but whether involved law enforcement member(s) acted pursuant to policy and training. See PHL 7-1-3-EO, §2.2. "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." *Id.*, at 3.2

This new requirement indirectly injects fault and liability questions into a fact-finding proceeding that had once been neutral. If a jury were to find that policy or training were not complied with, certainly civil or criminal liability can be inferred from a jury's answer in either the affirmative or negative to these new questions. Simultaneously, the Executive prohibits the chief law enforcement officer from testifying as to whether the involved officer followed policy and training. Instead, the Executive Order permits outside experts to be retained by the families of the slain individuals to give opinions as to whether the involved officer complied with policy and training. This incongruity expands the role of an inquest proceeding to include "expert opinion" while simultaneously prevents the chief law enforcement officer from testifying as to whether policy and training were followed. As a result, this creates a stacked fact-finding against the officer involved. Somehow this expansion of permitting an outside "expert" to testify as to policy and training compliance coupled with a prohibition against a chief of police to testify as to their involved officer's compliance with training and compliance is supposed to achieve transparency in the process. This thumb on the scale of justice that the Executive orders have meted out is *ultra vires* and appears to violate fundamental due process rights. This provision of allowing outside experts to testify as to compliance and forbearance of the chief of police to testify as to compliance is simply an Executive overreach and is *ultra vires*. In no other county does an inquest take on this expanded scope of fact finding under the guise of a neutral inquest proceeding. The addition of these new areas being inserted into an inquest has now created an adversarial proceeding that had once been regarded as a neutral fact-finding. Under the Executive's approach and response to this challenge, anyone with knowledge of the facts and circumstances regarding the incident can be allowed to testify, **except** for the involved officer or

the involved agency's chief of police. What could be more telling in a subsequent wrongful death lawsuit or a criminal proceeding than a one-sided finding from an outside expert, who testifies that the involved officer(s) failed to comply with policy and training. More so, the involved officer(s) are prohibited to testify as to self-defense (barred by Executive Order), nor can a chief testify that the involved officer complied with policy and training. Further, under the Executive's orders, the medical examiner delegated to the administrator now has the ability to determine which witnesses have knowledge of the facts and circumstances of the incident, only if it serves the family's purpose. This overreach has created an adversarial element into the inquest proceedings, and the court concludes the Executive has exceeded his authority.

The court recognizes that the Declaratory Judgment Act is broader than a writ and standing as conceded is "relaxed" for issues of significant public interest. See RCW 7.24.120. *City of Snoqualmie v. King County Executive Dow Constantine*, 187 Wn2d 289, 296, 386 P.3d 279, 283 (2016); see also, *City of Seattle v. State*, 103 Wn.2d 663,668, 694 P.2d 641 (1985). The intervenors have individual standing for declaratory relief, because this is a case of "serious public importance."

The Executive's authority to delegate pre-inquest "discovery" subpoena power is challenged. This is distinct form that authority to subpoena witnesses to attend the inquest hearing itself. The Executive Order assigns this subpoena to the Prosecutor. "Upon request by an administrator, [the Prosecutor] issues subpoenas for witnesses and/or documents." *Appendix* 2, §8.5. *See also,* §7.0 ("the King County Prosecuting Attorney and the *pro tem* staff attorney shall … (c) issue subpoenas to witnesses and/or for records at the administrator's request.").

In 2019, the Legislature amended the Coroner's Act to provide that "the coroner may, in the course of an active or ongoing death investigation, request that the superior court issue

subpoenas[.]" RCW 36.24.200. This statute was enacted in response to the Supreme Court's holding that the Pierce County Medical Examiner could not issue an investigative subpoena because no inquest was pending. "Subpoena power does not arise until there is a matter pending before a tribunal." *BNSF Ry. Co. v. Clark*, 192 Wn.2d 832, 840, 434 P.3d 50 (2019). "This section does not allow a coroner to demand to see the subpoenaed evidence prior to the inquest." *Id.* at 845. The Families, the Executive and the Administrator contend that this statute allows subpoenas to issue for discovery depositions prior to the inquest hearing. The court concludes differently.

First, the purpose of the 2019 amendment was to allow the "coroner" to request that the Superior Court issue a subpoena "in the course of an active or ongoing death investigation." This grant of power presumes that no legal proceeding, such as an inquest, is pending. "[T]he pendency of some proceeding in court is necessary in order to warrant the issuance of process for witnesses." *BNSF Ry. Co. v. Clark, supra* at 841 (*quoting Chambers v. Oehler,* 77 N.W. 853 (Iowa 1899)).

Second, the County Council granted pre-inquest power to the Medical Examiner, not to the Executive:

> *The chief medical examiner may issue subpoenas* to compel the production of medical and dental records, and other documents as are necessary for the full investigation of any case under the jurisdiction of the medical examiner from any person, organization or other entity in possession of the records or documents.

KCC 2.35A.090(E)(1) (emphasis added). The County Council has vested all powers in the Medical Examiner "except for the holding of inquests." KCC 2.35A.090(C). The Council granted authority to conduct death investigations only to the Medical Examiner. "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." KCC 2.35A.090.C.

Thus, the statute granted authority to the coroner to issue pre-inquest subpoenas in the course of an active or ongoing death investigation. And under the King County Code, the only official with the authority to issue subpoenas is the "Medical Examiner" during that official's death

investigation. And, this supposed authority is not based on the statute, which does not allow that official to issue subpoenas directly but only to request the court to do so, under the assumption that no inquest is pending.

The appearance of fairness doctrine applies in two circumstances.

> We apply the appearance of fairness doctrine to quasi-judicial proceedings in two circumstances: "(1) when an agency has employed procedures that created the appearance of unfairness and (2) when one or more acting members of the decision-making bodies have apparent conflicts of interest creating an appearance of unfairness or partiality."

In Re Disciplinary Proceedings Against Petersen, 785–86 180Wn.2d 768,369 P.3d:53 (2014). Both circumstances apply here. The procedures were created in an unfair manner and are substantively unfair.

The Executive Order describes the proceedings as quasi-judicial in nature. The proceedings certainly appear to be so, given the fact that they occur in a courtroom, presided over by a retired judge, with parties represented by attorneys who make opening and closing statements, seek discovery, offer evidence and propose jury instructions. However, the inquest is an Executive function.

The Supreme Court has previously applied the doctrine to the former version of inquests.

> An 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. Not only is the County Executive not bound in his delegation powers, fairness concerns dictate that he assign the inquest task to someone outside of his immediate authority, such as a district court judge.

Carrick v. Locke, supra at 143. "[I]nquests combine functions that can be described as both judicial and executive[.]" *Id.*, at 139.

In re Disciplinary Proceeding Against Petersen, 180 Wn.2d 768, 786, 329 P.3d 853 (2014), did not overrule or alter *Carrick's* application of the doctrine to these inquests. There the court stated "[t]he doctrine does not apply to executive functions such as prosecutorial inquests or

JUDGE JULIE SPECTOR
KING COUNTY SUPERIOR COURT
516 THIRD AVENUE
SEATTLE, WASHINGTON 98104
TELEPHONE: (206) 477-1342

coroner inquests. *See State v. Finch*, 137 Wash.2d 792, 809–10, 975 P.2d 967 (1999); *Carrick*, 125 Wash.2d at 140–43, 882 P.2d 173." *Id.*, at 786, n.17. However, *Carrick* endorsed the application of the doctrine to the presiding officer, so any citation to this case for the opposite proposition would be illogical. What *Carrick* actually says is "[t]he prosecutor is not the decisionmaker at the inquest, so there can be no appearance of fairness challenge to his or her involvement." *Carrick, supra* 143, n.8. The Executive order overruling Administrator Spearman's pre-inquest decision regarding officer testimony demonstrates the Executive's disregard for the independence of his chosen Administrator.

Title 36.24 RCW and King County Ordinance 2.35A.090(B) are the only sources of power that authorize the King County Executive to hold inquests. Under Title 36.24.RCW, the sole purpose of an inquest is to determine the cause and circumstances of the death. RCW 36.24.060; *Carrick v. Locke*, 125 Wn.2d 129, 133 (1994). Accordingly, the court holds that any inquests conducted under the Executive's powers shall be strictly limited to factual inquiries regarding the cause and circumstances of the death. The Executive is constrained under the statute from enacting any inquest rules that go beyond that narrow factual inquiry.

Appendix 2, Section 2.2 of PHL 7-1-3-EO provided, "[t]he law enforcement member(s) involved in the death…shall be allowed to have an attorney present provided that the law enforcement member(s) elect(s) to offer testimony subject to examination by other participating parties." The EO did not condition any other party's right to be represented by counsel in the inquest on an agreement to testify and be subject to cross-examination.

The goal of an inquest is a full, fair, and non-biased panel evaluation of the facts and circumstances, a process our system of justice has forever recognized requires advocacy on both sides of the issue to render a faithful, accurate finding. Disposing of a party for retaining constitutional rights cannot in any possible sense advance that seminal American justice ideal. The purpose of an inquest is to determine the identity of the deceased, the cause of death, and the circumstances of the death, including an identification of any actors who may be criminally liable. RCW 36.24.040; *Carrick*, 125 Wn.2d at 133, citing *State v. Ogle*, 78 Wn.2d 86, 88, 469 P.2d 918 (1970). This potential for criminal charges makes the right to invoke constitutional protections and the right to representation sacrosanct.

Washington courts have recognized the fundamentally different position officers occupy in an inquest due to their unique risk of prosecution. In *Miranda v. Sims*, 98 Wn. App. 898, 908–09, 991 P.2d 681, 687 (2000), for example, the court confirmed that law enforcement officers have a fundamentally different interest in "participating" by way of representative counsel in inquest proceedings because they have the potential be held civilly or criminally liable: "Here, the family's participation and interest in the proceeding is fundamentally different from that of the [officers]. The [officers] involved in the inquest may have had important knowledge of [decedent's] death and may be civilly or criminally liable." *Miranda* cited to seminal federal precedent acknowledging the unique situation officers occupy. *Id.*, citing *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 1489 (1967) *& Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489 (1964). Public employees, like all other persons, are entitled to the benefit of the Constitution, including the privilege against self-incrimination. *Seattle Police Officers' Guild v. City of Seattle*, 80 Wn.2d 307, 309–15, 494 P.2d 485, 487–90 (1972). The Executive's order ignored this precept as well and overruled Administrator Spearman's ruling regarding officer testimony. This demonstrates another violation of the appearance of fairness doctrine.

JUDGE JULIE SPECTOR
KING COUNTY SUPERIOR COURT
516 THIRD AVENUE
SEATTLE, WASHINGTON 98104
TELEPHONE: (206) 477-1342

The availability of the Fifth Amendment privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure or penalty which it invites. *State v. Post*, 118 Wn.2d 596, 604–05, 826 P.2d 172 (1992), citing *In re Gault*, 387 U.S. 1, 49, 87 S.Ct. 1428, 1455 (1967).

The Constitution demands that officers are entitled to "participate" by having counsel represent their interests even if they do not intend to testify or even appear. The "penalty" exception to the general rule that the Fifth Amendment is not self-executing excuses a privilege holder's failure to assert the privilege in situations where the State threatens to sanction the exercise of the privilege. The penalty could be economic loss or deprivation of liberty. *Id.* at 609. The analysis would focus on whether a particular disclosure that is later used in a criminal prosecution is (1) incriminating and (2) coerced by the threat of a penalty. *Id.*, at 610, citing *Minnesota v. Murphy*, 465 U.S. 420, 434-435, 104 S.Ct. 1136 (1984).

Although there are no criminal proceedings pending or anticipated against the officers, there has also been no grant of immunity or guarantee that there will not be such charges considered in the future; indeed, inquests include that prospect by statute. *See Post*, *supra* (The court found that Post did not face a realistic threat of incrimination when he made the statements because all questions were related to conduct for which Post had already pleaded guilty or been convicted, so his answers did not expose him to new or additional liability.) Not only is the prospect recognized by statute, but the Executive identified the inquest as akin to a law enforcement investigation, for which the individual being investigated possesses a right to remain silent regardless of forum.

The Court hereby finds and declares that any provision that undermines 5th or 6th Amendments rights as unconstitutional and finds a declaratory judgment in favor of the Intervenors. The Court also finds that every involved officer has the right to participate in the

inquest hearing through counsel, regardless of whether that officer chooses to testify in the hearing or not. The Executive and the County are hereby enjoined from implementing any inquest rules that in any way infringe on an involved officer's Fifth or Sixth Amendment rights.

PHL 7-1-4 EO also compels the "chief law enforcement officer" to offer evidence regarding agency training and policy. Appendix 2, Section 12.3 of the EO states:

> 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.

The EO further provides:

> 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.

PHL 7-1-4-EO, Appendix 1, Section 2.0.

Both of the aforementioned requirements exceed the statutory scope of an inquest. The Court finds that requiring the chief law enforcement officer of the involved officer's agency to testify with respect to department policies and training, but prohibiting the chief law enforcement officer from testifying to any conclusions as to whether the employee's actions complied with those policies and training violates fundamental fairness and exceeds the Executive's powers. The

Court also finds that the inclusion of findings with respect to whether the involved officer(s) acted pursuant to policy and training exceeds the permissible scope of an inquest. The "cause and circumstances of the death" do not include a jury determination of whether or not the involved officer(s) acted in compliance with the policies and/or training of his or her agency. The Court hereby finds and declares invalid PHL 7-1-4-EO, Appendix 1, Section 2.0 and Appendix 2, Section 12.3. The Court hereby enjoins the Executive and the County from promulgating any similar inquest rules in the future until the matter is ruled on by the Supreme Court.* However, this finding and injunction does not in any way limit the involved officer's ability to testify about relevant training or department policies that factored into his or her decision to use the force at issue.

The EO also improperly excludes testimony or conclusion by the inquest jury of "[t]he 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." Appendix 2, §14.2. Whether the involved officer(s) were in imminent fear of death or serious bodily harm when they used deadly force is an important factual issue relevant to the cause and circumstances of the death. The Court hereby enjoins the Executive and the County from preventing the involved officer(s) from testifying to their state of mind during the incident.

PHL 7-1-4-EO also contains a provision that allows the Administrator to admit evidence of the involved officer's disciplinary history, if the Administrator determines the disciplinary history is "directly related to the use of force." PHL 7-1-4 -EO, Appendix 2, Section 4.6. The "cause and circumstances of the death" do not include evidence of the involved officer's

disciplinary history. Issues pertaining to prior discipline are better left to an administrator to decide on an *ad hoc* basis.

Inquiry into training and policy is also outside the statutory scope of an inquest. The Supreme Court has recently confirmed that the "fact-finding" inquest process authorized by RCW 36.24 et seq. 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." *BNSF Ry. Co. v. Clark*, 192 Wn.2d 832, 838, 434 P.3d 50 (2019). Whether an officer acted in compliance with policy is not within that factual panoply. The life and/or job experience of those involved in the incident are simply not part of the inquiry. Certainly, the Executive could, within the protocols of county government, provide a forum to address training and policy issues, but the inquest process is not that forum.

The Executive Order invites speculation regarding policy and training, without allowing crucial and relevant evidence. According to the current inquest procedures, the "top law enforcement official" of the involved officer's department is required to testify regarding applicable policies and training, "as they relate to the death." The Executive Order then creates an anomalous situation where the chief law enforcement officer is prohibited from construing the applicable policy and training within the circumstances of the death, presumably leaving a panel of lay jurors to guess at the issue from a position of utter ignorance. Given that the organic legislation requires all witnesses with relevant testimony be called, if policy and training are relevant inquiries the Executive may not, within the bounds of the statute, prohibit fulsome testimony on the topics.

A more fundamental flaw to the order's provision, however, is the underlying speculation related to applicable policy and training. In the Butt's inquest, while Administrator Spearman

undertook a careful evaluation and limited the policy and training issues he intended to present to the jurors, the only evidence presented established that some of those policies objectively did not apply to the scenario. The department, which knows the policy and training and whether it is applicable, made it clear that officers were not trained to apply certain of the administrator-approved policies to the circumstances the officers faced. The police department – the organization responsible for implementing the policies and training the officers and, the only source with the foundation to say whether particular policies and training applied – informed the administrator that officers were not trained to apply certain of the selected policies to the circumstances they faced. There was no founded, knowledgeable rebuttal to that testimony. The administrator's decision, consequently, would have left the jurors in the position of speculating and rendering an opinion as to whether officers followed a policy they were never trained to apply and that their employer specifically noted did not apply. Under no circumstances does abject speculation on an undeniably faulty premise enhance the fact-finding purpose of an inquest, transparency, or any other purported benefit of an inquest and certainly finds no support in this legislation.

The "cause and circumstances of the death" do not include evidence that goes to fault or liability, either civil or criminal. An inquest is not a culpability finding proceeding. *Carrick*, 125 Wn.2d at 133. 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. 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.

CONCLUSION

The Court hereby enters an injunction and declaratory judgment as to:

Intervenors and Families possess standing to challenge the Executive Order;

1. The following newly established inquest procedures in Executive Order PHL 7-1- 4-EO are invalid because they are in excess of the authority granted to the Executive by Charter and County Code:
    a. Allowance of pre-hearing written discovery;
    b. Issuance of pre-hearing "discovery" subpoenas;
    c. Introduction of evidence regarding compliance with 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;
2. The newly established inquest procedures in Executive Order PHL 7-1-4-EO are invalid because they violate the appearance of fairness doctrine in the following ways:
    a. The Inquest Administrator cannot be an at-will employee of the Executive;
    b. The process by which the Executive Orders were drafted and the hearing procedures themselves appear unfair;
3. The Executive and the County have no pre-inquest "discovery" subpoena power and any purported delegation to the Administrator or others is invalid;
4. The Executive and the County are enjoined from imposing any future restriction on an officer's right to participate in an inquest through counsel, regardless of whether they choose to testify;
5. The Executive and the County are enjoined from violating officers' or others'

constitutional rights, including but not limited to, the right to remain silent and all applicable rights under the 5th and 6th Amendments to the U.S. Constitution;

6. The Executive and the County are enjoined from imposing any restrictions on the inquest panel hearing and considering an officer's state of mind, including the defense of self or others.

*Certification;

Because this is a matter of great public interest, this court certifies the ruling to the Washington State Supreme Court under RAP 4.2 (2), (4), and (5).

IT IS SO ORDERED this 21st day of August, 2020.

Honorable Julie Spector
King County Superior Court

JUDGE JULIE SPECTOR
KING COUNTY SUPERIOR COURT
516 THIRD AVENUE
SEATTLE, WASHINGTON 98104
TELEPHONE: (206) 477-1342