

FILED
SUPREME COURT
STATE OF WASHINGTON
9/4/2020 4:27 PM
BY SUSAN L. CARLSON
CLERK

No. 98154-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JULIAN PIMENTEL,

Petitioner,

v.

THE JUDGES OF THE KING COUNTY SUPERIOR COURT and
DAN SATTERBERG, KING COUNTY PROSECUTING ATTORNEY,

Respondents.

BRIEF OF RESPONDENT THE JUDGES OF THE KING COUNTY
SUPERIOR COURT

CORR CRONIN LLP

Steven W. Fogg, WSBA No. 23528
Victoria E. Ainsworth, WSBA No. 49677
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
(206) 625-8600 Phone
(206) 625-0900 Fax
sfogg@correronin.com
tainsworth@correronin.com

*Attorneys for The Judges of The King
County Superior Court*

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I. INTRODUCTION

More than a year after the criminal charges against him for felony sexual assault were dismissed, petitioner Julian Pimentel (“Pimentel” or “Petitioner”) filed this moot original action seeking a writ of prohibition or, in the alternative, mandamus, against respondents King County Prosecuting Attorney Dan Satterberg (“Satterberg”) and the Judges of King County Superior Court (“the Judges”). Specifically, Petitioner seeks a writ prohibiting the Judges from increasing a district court’s pre-charge bail determination when issuing an arrest warrant at a nonadversarial probable cause hearing, and directing the Judges and Satterberg to instead provide notice and a contested bail hearing to the accused before even issuing an arrest warrant.

Crucially, Petitioner does not contest that the current procedure—whereby the State files an Information, the Judges make a determination of probable cause, issue a warrant, and, where appropriate, set a bail provision in the warrant—is authorized by Criminal Rule (“CrR”) 2.2. Nor does Petitioner contend that the Judges failed to comply with CrR 2.2. Unable to establish a lack of jurisdiction, as required for a writ of prohibition, Petitioner instead attempts to attack the constitutionality of CrR 2.2. Petitioner’s arguments are devoid of merit.

The bail setting procedures authorized by CrR 2.2, which the judges fully comply with, do not violate Petitioner’s due process or right to counsel under the federal and state constitutions. Both this Court and the U.S. Supreme Court have held that probable cause determinations are nonadversarial and not a “critical stage” at which the Sixth Amendment right to counsel attaches. It is similarly well-settled, both by this Court and the U.S. Supreme Court, that due process notice requirements do not apply when, as here, a warrant issues.

Simply put, Petitioner’s numerous constitutional arguments, most of which are raised in passing without argument or authority, are red herrings. This Court’s inquiry on an application for prohibition is narrow: the “sole question” is whether the Judges have subject matter jurisdiction. If they do, “the writ *must* be denied.” *State v. Superior Court of Franklin County*, 86 Wash. 90, 95, 149 P. 321 (1915) (emphasis added). Petitioner’s claims are thus fatally flawed—and the application for writ must be denied—because it is undisputed that the Judges have original jurisdiction over every felony criminal case filed in King County Superior Court.

II. RESTATEMENT OF FACTS

A. **Petitioner Julian Pimentel is arrested without a warrant on suspicion of sexual assault of a minor in April 2018.**

On March 18, 2018, a minor reported to the Federal Way Police Department (“FWPD”) that petitioner Julian Pimentel had sexually assaulted her while she was intoxicated and unable to consent. (AR 12, 18-20) The incident occurred on February 10, 2018. (AR 12). The 15-year-old victim reported that Mr. Pimentel had furnished alcohol, which he had stolen, to her and her friends. (AR 12) After the victim had become intoxicated, Mr. Pimentel “kicked out the others” so that he could be alone with her. (AR 12, 18) The victim alleged that Mr. Pimentel had sexual intercourse with her while she was too incapacitated to consent. (AR 12, 19) The victim also reported physical injuries from the assault. (AR 19)

After conducting an investigation into the allegations, including a child forensic interview with the victim and interviews with witnesses, FWPD concluded that there was probable cause to believe Mr. Pimentel had “committed the crime(s) of Indecent Liberties (Mentally Defective – Physically Helpless)” on February 10, 2018. (AR 18) FWPD did not issue a warrant for Mr. Pimentel’s arrest, but sent a letter to Mr. Pimentel directing him to surrender or be arrested on probable cause. (*See* Pet. Br. 3) At 11:40am on April 17, 2018, Mr. Pimentel turned himself in to FWPD and was arrested and booked into jail. (AR 21-22) At the time of arrest,

Mr. Pimentel “invoked his right to a lawyer and declined to provide any statements.” (AR 21)

B. Despite finding the State’s request for \$150,000 bail not unreasonable, the district court initially released Pimentel on his own personal recognizance based on a next-day return date.

On April 18, 2018, the FWPD filed a “Superform” with the King County District Court. (AR 11) The Superform had been prepared and signed by FWPD Detective Adams on March 30, 2018. (AR 11) The form included an eight-sentence “Statement of Probable Cause” setting forth the “facts showing probable cause for each element of the offense and that the suspect committed the offense.” (AR 11) On the form, Detective Adams checked a box requesting charges be “rush-filed” within 72 hours. (AR 11) However, Detective Adams also indicated on the form that he did not object to Mr. Pimentel’s release pending the filing of charges. (AR 11)

On April 18, 2018, the day after he was arrested without a warrant, Mr. Pimentel appeared before King County District Court Judge Charles DeLaurenti (“the district court” or “Judge DeLaurenti”) on the felony first appearance calendar. (*See* AR 3) Mr. Pimentel was represented by counsel, David Allen, at the first appearance. (AR 3) Mr. Pimentel’s father, who is an attorney, was also present at the preliminary hearing. (AR 5) Because the State had not yet filed charges against Mr. Pimentel, the district court case was set under an “Investigation Cause No.” (AR 3) At the preliminary

hearing, the State asked “for a finding of probable cause for Rape in the Second Degree under . . . incapable of consent.” (AR 3)

Judge DeLaurenti gave Mr. Pimentel an opportunity “to be heard as to probable cause.” (AR 3) However, Mr. Pimentel, through his counsel, did not challenge probable cause, instead informing the district court that “we’ll take no position on that.” (AR 3) Based on Detective Adams’ “Affidavit of Probable Cause/Superform,” Judge DeLaurenti made “a finding of probable cause, one count of Rape in the Second Degree under section (b), incapable of submitting.” (AR 3; App. B. at ¶ 8¹).

The State requested bail be set at \$150,000 to ensure the safety of the community. (AR 4) Specifically, the State noted several “extremely concerning” facts about the case, including that Mr. Pimentel had furnished alcohol to the victim; that Mr. Pimentel had “asked the other people who were present to leave” so that he could be alone with the victim; that the victim was only “semiconscious at the time” of the alleged rape; that Mr. Pimentel “later bragged to the other people who were there” that he had had sexual intercourse with the victim; and that the victim reported physical injuries from the assault. (AR 3-4; *see also* AR 12)

¹ On August 17, 2020, this Court granted the Judges’ Motion for Additional Evidence on Review to include the declarations of Judge Dean Lum and Judge DeLaurenti. The Judges cite to Judge Lum’s declaration as “App. A” and Judge DeLaurenti’s declaration as “App. B,” as originally appended to the Judges’ Motion for Additional Evidence.

Mr. Pimentel's attorney argued for release on personal recognizance, noting that Mr. Pimentel's father "is an attorney practicing law in Kitsap County and will certainly provide a stable residence for Julian when he is released." (AR 4-5) Mr. Pimentel's father, Adrian Pimentel, confirmed on the record that his son would live with him upon release, that "Julian has never had a job, so he has no ability to earn money or to run," and thus "[t]he risk of flight is zero." (AR 7) Mr. Pimentel also stated that he would take his son to his law firm during the workday. (AR 8)

Judge DeLaurenti was "[c]learly . . . concerned about the nature of the alleged violation" and found that "[t]he State's recommendation for bond is not unreasonable." (AR 8) However, Judge DeLaurenti also took into account the "Detective's nonobjection [in the Superform] to Mr. Pimentel being released on his personal recognizance, and the jail screener's recommendation for that decision." (App. B at ¶ 8) Ultimately, Judge DeLaurenti released Mr. Pimentel on his personal recognizance until the next day. (AR 8)

That fact that Mr. Pimentel's return date was scheduled for the very next day, April 19, was critical to Judge DeLaurenti's decision to release Mr. Pimentel on his own personal recognizance to the custody of his father. (See App. B at ¶ 9: "I first confirmed that the return date was tomorrow at 2:45pm") It was Judge DeLaurenti's "common practice to note for the

record when the return date was when deciding the conditions of release.” (App. B at ¶ 7) This is because, like all King County District Court judges, Judge DeLaurenti knew that his “responsibilities at the first appearance [were] limited.” (App. B at ¶ 7) King County District Court judges know that they are “not setting bail for the life of the case” at the first appearance; “rather, he or she is just deciding the conditions of release that are appropriate for the limited time—24 to 72 hours—required for the State to assess whether charges should be filed.” (App. B at ¶ 7)

In releasing Mr. Pimentel on his personal recognizance for a day, Judge DeLaurenti notified the parties that either he or the superior court (if charges were formally filed) would consider setting bail or additional conditions of release the next day:

The State’s recommendation for bond is not unreasonable, but when I look at all the circumstances and with the return date tomorrow, I will release him on his personal recognizance Assuming that his father is willing to keep control, I will simply require that he is released to his father to return tomorrow afternoon at 2:45. And I would consider—and I’m not sure what the Superior Court will do—the Court would also consider . . . that tomorrow, even if bail isn’t set at a minimum, probably a GPS monitoring device to keep track of his whereabouts.

(AR 9, emphasis added)

Petitioner was released that same day. The “Conditions of Release”² notified him that his release was “Pending Filing of Charges.” (AR 13) Petitioner also expressly consented: “I UNDERSTAND THAT EVEN THOUGH CHARGES HAVE NOT BEEN FILED ON THIS INVESTIGATION THE STATE MAY FILE CHARGES AT A LATER DATE.” (AR 13)

C. King County Superior Court assumed jurisdiction and set bail at \$50,000 when the State formally charged Pimentel with felony assault in the second degree with a sexual motivation.

On April 19, 2018, the State filed an Information formally charging Mr. Pimentel with “Assault In The Second Degree—Sexual Motivation” in King County Superior Court (“the superior court”). (AR 16 The State filed the Information at 2:26pm, approximately 20 minutes before Mr. Pimentel was due to re-appear before Judge DeLaurenti in the district court. (AR 13, 16-17) The State submitted a four-page “Certification for Determination of Probable Cause” with the Information. (AR 18-21) Unlike the eight-sentence statement of probable cause submitted to the district court with the Superform, the April 17, 2018 certification for determination of probable cause filed in the superior court set forth “much more detail” of the incident and allegations. (*Compare* AR 17-21 with AR 12) These additional details

² In addition to a Sexual Assault Protection Order prohibiting Mr. Pimentel from contacting A.R.W., Judge DeLaurenti ordered that Mr. Pimentel have no contact with the victim and possess no alcohol or drugs as conditions of release. (AR 13-15)

included statements from witnesses corroborating the victim's allegations against Mr. Pimentel. (AR 18-21)

The State submitted a "Prosecuting Attorney Case Summary and Request for Bail and/or Conditions of Release" with the Information. (AR 17) The State accurately informed the superior court that it had requested \$150,000 at Mr. Pimentel's first appearance, but that the district court had instead released him on his personal recognizance. (AR 17) The State also correctly noted that, at the first appearance, Judge DeLaurenti had been "unaware that there were statements from friends that were with the victim and the defendant" the day of the incident. (AR 17) Judge DeLaurenti had only had before him the "Affidavit of Probable Cause/Perform" at the time of Mr. Pimentel's first appearance. (App. B at ¶ 8)

Although Judge DeLaurenti had not found the State's request for \$150,000 to be unreasonable, the State did not renew this request before the superior court. Taking into account that Mr. Pimentel had allegedly stolen alcohol, furnished it to minors, and then sexually assaulted an incapacitated and semi-conscious 15-year old, the State requested that the superior court issue a warrant for Mr. Pimentel's arrest and set bail at \$50,000. (AR 17)

On April 19, 2018, King County Superior Court Judge Cayce made a determination of probable cause for Assault In The Second Degree, ordered the issuance of an arrest warrant, and set bail at \$50,000. (AR 23-

26, 32) Mr. Pimentel posted bond that same day and was released. (AR 32)
On May 3, 2018, Mr. Pimentel was arraigned and the superior court issued
a two-year Pre-trial Sexual Assault Protection Order. (AR 33-35)

D. Pimentel filed this original action, which is moot, more than a year after the criminal charges against him were dismissed.

The State dismissed the charges against Mr. Pimentel on January 11, 2019. (AR 36-37) More than a year later, on February 4, 2019, Mr. Pimentel filed this original action in this Court, seeking a writ of prohibition or, alternatively, mandamus, to prohibit King County prosecutors from requesting, and the Judges of King County Superior Court from entertaining, “ex parte motions” to increase bail after the district court’s bail determination at the first appearance. On April 17, 2020, Commissioner Johnston of this Court ruled that the original action was moot, as Mr. Pimentel had no pending criminal charges. Nevertheless, Commissioner Johnston retained this moot action for a decision on the merits.

III. ARGUMENT

A. A writ of prohibition cannot lie where, as here, the Judges are not acting “without or in excess” of their jurisdiction and an adequate remedy exists in the ordinary course of the law.

1. A writ of prohibition is a drastic and extraordinary remedy to be used with great caution.

As this Court recently recognized, the writ of prohibition “is an extraordinary remedy to be used with ‘great caution and forbearance.’”

Riddle v. Elofson, 193 Wn.2d 423, 429, 439 P.3d 647 (2019) (quoting James L. High, *Extraordinary Legal Remedies* 709 (3d ed. 1896)). Because it is “a drastic measure,” a writ of prohibition may “be used only when two factors coincide: (1) [a]bsence or excess of jurisdiction, and (2) the absence of a plain, speedy, and adequate remedy in the course of legal procedure.” *Kreidler v. Elkenberry*, 111 Wn.2d 828, 838, 766 P.2d 438 (1989) (quoted source omitted). “If either of these factors is absent, the court cannot issue a writ of prohibition.” *Brower v. Charles*, 82 Wn. App. 53, 58, 914 P.2d 1202 (1996), *rev. denied*, 130 Wn.2d 1028 (1997). Whether a writ will issue is thus a narrow inquiry. *Riddle*, 193 Wn.2d at 429. This Court will not issue a writ of prohibition “to prevent the commission of error, take the place of an appeal, or serve as a writ of review for the correction of an error.” *Riddle*, 193 Wn.2d at 429.

Petitioner fails to satisfy either of the requisite elements under this Court’s narrow inquiry. It is undisputed that the Judges have original jurisdiction of all felony criminal proceedings filed in King County Superior Court. The Judges do not exceed that jurisdiction by making a determination of probable cause, issuing an arrest warrant, and setting bail upon the State’s filing of an Information—a procedure authorized by CrR 2.2. Even if the Judges *had* exceeded that jurisdiction—and they plainly did not—an adequate remedy to address bail determinations already exists

in the ordinary course of law. Accordingly, the Court must deny Petitioner's application for a writ of prohibition.

2. Petitioner's application for a writ of prohibition fails because the Judges are not acting "without or in excess" of their jurisdiction.

a. It is undisputed that the Judges have subject matter jurisdiction of all felony criminal proceedings filed in King County Superior Court.

The "sole question necessary to a disposition of this application [for writ of prohibition] is this: Did the superior court have jurisdiction of the subject-matter of the action? If it did the writ must be denied." *State v. Superior Court of Franklin County*, 86 Wash. 90, 95, 149 P. 321 (1915) (emphasis added). This Court must deny Petitioner's writ because it is undisputed that the Judges had subject matter jurisdiction over Petitioner's superior court criminal case here, as well as all felony criminal proceedings filed in King County Superior Court.

Jurisdiction means "the power to hear and determine a controversy, *regardless of whether the ruling made in the particular case is correct or incorrect.*" *State ex rel. N.Y. Cas. Co. v. Superior Court for King County*, 31 Wn.2d 834, 839, 199 P.2d 581 (1948) (emphasis added). The "critical concept in determining whether a court has subject matter jurisdiction is the 'type of controversy.'" *Dougherty v. Dep't of Labor & Indus. for State of Wash.*, 150 Wn.2d 310, 316, 76 P.3d 1183 (2003) (quoted source omitted).

Washington superior courts “have original jurisdiction in the categories of cases listed in the constitution, which the legislature cannot take away.” *ZDI Gaming Inc. v. Wash. State Gambling Com’n*, 173 Wn.2d 608, 617, 268 P.3d 929 (2012) (citing Wash. Const. art. IV, § 6). One type of controversy of which “[t]he superior court shall have original jurisdiction” is “in all criminal cases amounting to felony.” Wash. Const. art. IV, § 6; *see also State v. Posey*, 174 Wn.2d 131, 141, 272 P.3d 840 (2012) (“legislature *cannot* rescind this constitutional jurisdiction or vest it exclusively in another court”).

It is undisputed that the State filed an Information charging Petitioner with assault in the second degree with a sexual motivation in King County Superior Court on April 19, 2018. (AR 16) Second degree assault is a felony. *See* RCW 9A.36.021(2). By charging Petitioner with a felony, the State invoked the superior court’s original jurisdiction of his criminal case. *See* CrRLJ 3.2.1(g)(1) (“Jurisdiction vests in the superior court at the time the information is filed.”); *State v. Barnes*, 146 Wn.2d 74, 81, 43 P.3d 490 (2002) (superior court acquires jurisdiction with the filing of an information); *Shoop v. Kittitas County*, 149 Wn.2d 29, 35 n.2, 65 P.3d 1194 (2003) (“A properly commenced action endows the superior court with subject matter jurisdiction.”).

Where, as here, the Judges had jurisdiction—which is the “sole question” before this Court on an application for prohibition, *Franklin County*, 86 Wash. at 95—“all other defects or errors go to something other than subject matter jurisdiction.” *ZDI Gaming*, 173 Wn.2d at 618 (quoted source omitted). Accordingly, the writ must be denied.

b. The Judges did not exceed their jurisdiction by complying with applicable court rules and statutes.

Unable to refute the Judges’ undisputed subject matter jurisdiction of his superior court criminal case, Petitioner instead claims that the superior court somehow exceeded this jurisdiction through a “long standing *ex parte* bail procedure.” (Pet. Br. 20, emphasis in original). However, the superior court’s “bail procedure” in making a probable cause determination, issuing an arrest warrant, and setting bail without notice to Petitioner, is authorized by CrR 2.2. It is undisputed that Judge Cayce complied with CrR 2.2 in setting Petitioner’s bail. Moreover, no court rule or statute requires the Judges be bound by the district court’s pre-charge bail determination. Because Petitioner has provided no authority that the Judges’ compliance with applicable court rules and statutes constitutes an “excess or jurisdiction,” the Court should deny the writ.

i. The Judges do not exceed their jurisdiction by complying with CrR 2.2.

Under CrR 2.2, the Judges have authority to “direct the clerk to issue a warrant for the arrest of the defendant” “[i]f an indictment is found or an information is filed.” CrR 2.2(a)(1). However, “[b]efore ruling on a request for a warrant,” the Judges must make a finding of probable cause. CrR 2.2(a)(2). In making a determination of probable cause, the Judges have discretion to require the complainant to appear personally and “examine under oath the complainant and any witnesses the complainant may produce.” CrR 2.2(a)(2). CrR 2.2 does not require notice to the accused or mandate that the Judges require the accused to appear personally. To the contrary, the Judges “shall determine probable cause based on an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto,³ or sworn testimony establishing the grounds for issuing the warrant.” CrR 2.2(a)(2).

After finding probable cause to issue the warrant, the Judges set bail. *Westerman v. Cary*, 125 Wn.2d 277, 290, 892 P.2d 1067 (1994) (“the judge issuing the warrant will determine probable cause and set bail”). Setting bail in a felony case is an issue squarely within the Judges’ discretion. *See* RCW 10.19.055 (“[b]ail for the release of a person arrested and detained for

³ RCW 9A.72.085 sets forth the form of an “unsworn written statement, declaration, verification, or certificate” that may be used in an official proceeding.

a class A or B felony offense must be determined on an individualized basis by a judicial officer”).

This is the exact process that occurred here. The State filed an Information on April 19, 2018, formally charging Petitioner with a felony and invoking the superior court’s original jurisdiction. Judge Cayce made a finding of probable cause “pursuant to CrR 2.2(a),” properly basing his determination on a Certificate for Determination of Probable Cause submitted by the State under penalty of perjury. (AR 16-26) Judge Cayce had discretion to set Petitioner’s bail upon finding probable cause to charge Petitioner with a felony. *See* RCW 10.19.055; *Westerman*, 125 Wn.2d at 290 (“the bail bond . . . shall be reasonable and *at the sound discretion of the court*”) (emphasis in original) (quoted source omitted). Consistent with the procedures authorized by CrR 2.2, Judge Cayce granted the State’s request for a warrant and set bail at \$50,000.

Crucially, Petitioner does not argue that Judge Cayce failed to comply with CrR 2.2, effectively conceding this point. *Sprague v. Spokane Valley Fire Dep’t*, 189 Wn.2d 858, 876, 409 P.3d 160 (2018) (this Court “will not consider arguments that a party fails to brief”). This concession is fatal to Petitioner’s application for prohibition—particularly where Petitioner provides no authority for the proposition that the Judges could have exceeded their jurisdiction by complying with a court rule or statute.

ii. No statute or court rule binds the Judges to the district court's pre-charge bail determination when setting bail in an arrest warrant.

Petitioner cites no authority for the proposition that the Judges are bound, or their discretion is somehow tempered, by the district court's pre-charge bail determination. As a court of limited jurisdiction, the district court has jurisdiction over felony criminal cases only "to sit as a committing magistrate and conduct preliminary hearings in cases provided by law." RCW 3.66.060. The primary purposes of the district court's preliminary hearing are a judicial determination of probable cause, judicial review of the conditions of release, "to prevent unlawful detention and to eliminate the opportunity and incentive for application of improper police pressure." *State v. Bradford*, 95 Wn. App. 935, 948, 978 P.2d 534 (1999), *rev. denied*, 139 Wn.2d 1022 (2000).

To achieve this, CrRLJ 3.2.1 requires an individual arrested without a warrant to have a "judicial determination of probable cause no later than 48 hours following the person's arrest" and prohibits an individual from being "detained in jail or subjected to conditions of release for more than 72 hours after the accused's detention in jail or release on conditions. CrRLJ 3.2.1(a), (f)(1). Where, as here, "no complaint, information or indictment has been filed at the time of the preliminary appearance," the district court must either order that the accused be exonerated from the

conditions of release within 72 hours or set a time, within 72 hours, at which the accused must reappear before the district court. CrRLJ 3.2.1(f)(1).

Judge DeLaurenti's exercise of jurisdiction of Petitioner's case was limited to these pre-charge proceedings. (*See* App. B. at ¶ 7: "The District Court's responsibilities at the first appearance are limited.") District court judges are well aware that they are "not setting bail for the life of the case," but rather merely "deciding the amount of bail that is appropriate for the limited time—24 to 72 hours—required for the State to assess whether charges should be filed." (App. B at ¶ 7) For this reason, the district court necessarily sets bail "with hypothetical, not actual, charges in mind, often on limited information." (App. A at ¶ 6) If the State fails to file an Information "by the time set for release or reappearance," the accused in the district court is either "immediately released from jail or deemed exonerated from all conditions of release." CrRLJ 3.2.1(f)(2)(ii).

It is entirely consistent with the district court's *limited* jurisdiction that, when "charges are actually filed against a defendant pursuant to LCrR 2.2, Superior Court judges are not bound by the first appearance and are commonly asked to review the pre-charging bail decision of the District Court judge following the filing of criminal charges." (App. A at ¶ 7) Nothing in CrR 2.2 requires the Judges to give deference to the district court's pre-charge bail determination; nor would it make practical sense for

the superior courts to be so bound. The district court's bail determination at the preliminary hearing was (a) based on hypothetical charges and (b) aimed at ensuring that an accused is not improperly detained beyond 48 hours without a finding of probable cause of the warrantless arrest.

In contrast, when charges are filed in the superior court, the Judges make a determination of probable cause, issues a warrant or summons, and sets bail based on *actual* charges filed by the State. The Judges thus have the benefit of additional information regarding the nature of and allegations giving rise to the actual charges. Contrary to Petitioner's claims (Pet. Br. 29), "the Superior Court does not 'routinely' raise the District Court's bail decision in the 'great majority of cases.'" (App. A at ¶ 8) Rather, "the vast majority of defendants did not have their bail increased, and just as many (and at times, more) benefited by having their bail reduced, sua sponte." (App. A at ¶ 8) In addition, many defendants are released on their personal recognizance when the Judges declined to issue a warrant and instead required the State to obtain a summons. (App. A at ¶ 8). Simply put, it is inaccurate for Petitioner "to suggest that the Deputy Prosecuting Attorney's bail request is rubber-stamped." (App. A at ¶ 8).

c. An abuse of discretion does not give rise to a writ of prohibition.

Petitioner repeatedly, and erroneously, conflates the two distinct concepts of discretion and jurisdiction. Only the latter is relevant to this Court's "narrow inquiry" of an application for a writ of prohibition. It is well-established that "[t]he function of a writ of prohibition is to arrest proceedings which are without, or in excess of, jurisdiction, and *not to review errors in matters of procedure where jurisdiction exists.*" *State v. Superior Court of King County*, 45 Wash. 248, 251, 88 P. 207 (1907) (emphasis added). *See, e.g., State v. Kennan*, 35 Wash. 52, 54, 76 P. 516 (1904) ("As the court had jurisdiction of the subject-matter, prohibition will not lie to prevent an erroneous exercise of that jurisdiction."); *State ex rel. Foster v. Superior Court of King County*, 30 Wash. 156, 157, 70 P. 230 (1902) (denying writ of prohibition where "[t]he court below certainly had jurisdiction"; "its ruling, even if error, cannot be reviewed here upon petition for prohibition"); *State v. Superior Court of Grant County*, 76 Wash. 376, 379, 136 P. 144 (1913) (writ of prohibition "will not restrain the erroneous exercise of acknowledged jurisdiction").

As set forth above, the Judges have discretion in setting bail when issuing an arrest warrant pursuant to CrR 2.2. *See* RCW 10.19.055; *Westerman*, 125 Wn.2d at 289-90. Petitioner blatantly ignores the critical principle that, even if the Judges erroneously exercised their discretion by

“increasing” bail from the pre-charge amount set by the district court, any “errors in matters of procedure” cannot serve as the basis for a writ of prohibition “where jurisdiction exists.” *King County*, 45 Wash. at 251. A writ cannot issue based on any error arising from the Judges’ exercise of its undisputed jurisdiction.

3. Petitioner’s application for a writ of prohibition fails because a plain, speedy, and adequate remedy already exists in the ordinary course of law.

A writ will not issue if there exists a plain, speedy, and adequate remedy in the ordinary course of legal procedure. A remedy “is not inadequate merely because it is attended with delay, expense, annoyance, or even some hardship.” *O’Brien v. Police Court of Seattle*, 14 Wn.2d 340, 347, 128 P.2d 332 (1942). Rather, there “must be something in the nature of the action or proceeding that makes it apparent to this court that it will not be able to protect the rights of the litigants or afford them adequate redress otherwise than through the exercise of this extraordinary jurisdiction.” *O’Brien*, 14 Wn.2d at 348 (quoting *State v. Superior Court of Spokane County*, 40 Wash. 555, 559, 82 P. 877 (1905)); *Riddle*, 193 Wn.2d at 434 (“Something in the nature of the action must make it apparent that the rights of the litigants will not be protected or full redress will not be afforded without the writ.”).

As an initial matter, a writ is not necessary to protect Petitioner's rights or ensure full redress, because Petitioner's claims are moot. The State dismissed the criminal case against Petitioner on January 11, 2019. (AR 36-37) Petitioner then waited over a year, until February 4, 2020, to file this instant original action for a writ. There are no pending criminal charges against Petitioner. Petitioner needs neither redress nor remedy where there is no injury. Regardless, even if this were a live controversy, adequate remedies exist in the ordinary course of legal procedure to challenge bail determinations.

First, a defendant can file a motion with the superior court to contest the bail determination. (App. A at ¶ 9) Petitioner himself concedes that he could "note a motion with seven days' notice." (Pet. Br. 30) He could also seek an emergency bail hearing prior to arraignment, which the superior court "would grant . . . on shortened time." (App. A at ¶ 10) Indeed, there *is* an "established procedure available in King County Superior Court whereby a defendant can have an expedited hearing" (Pet. Br. 29): the superior court has a bond hearing calendar specifically for "[m]otions to address bail or other conditions of release, prior to trial or plea." *Bond Hearing Calendar*, King County Superior Court Criminal Department

Manual § 7 (Jan. 2020).⁴ Contrary to Petitioner’s assertion that “it would still take several days and a great deal of effort to schedule an expedited hearing” (Pet. Br. 30), these bond hearings “may be set on the bond calendar *as soon as possible (shorter than six days)*, as long as notice is given.” *Setting a Bond Hearing*, Criminal Department Manual § 7.2 (emphasis added). Regardless, even if setting a bond hearing *did* take “effort” and “several days” (Pet. Br. 30), such “delay,” “annoyance, or even some hardship” does not render the bond hearing calendar “inadequate.” *O’Brien*, 14 Wn.2d at 347.

Second, a defendant is entitled to challenge the superior court’s bail determination at the arraignment, which occurs within fourteen days of the State filing charges. *See* CrR 4.1(a); App. A at ¶ 9. Third, a defendant can challenge a bail determination through the appellate process. *See, e.g., State v. Barton*, 181 Wn.2d 148, 168, 331 P.3d 50 (2014) (interlocutory appeal holding that bail order requiring cash bail violated the state constitution). Simply put, the facts of this case do not show that Petitioner’s rights “will not be protected or full redress will not be afforded without the writ.” *Riddle*, 193 Wn.2d at 437.

⁴ King County Superior Court Criminal Department Manual (Jan 2020), *available at* <https://www.kingcounty.gov/~media/courts/superior-court/docs/criminal/criminal-manual.ashx?la=en> (last accessed Sep. 4, 2020).

4. A writ of prohibition cannot lie where, as here, it seeks to compel a continuing general course of conduct.

Petitioner’s writ application fails for an additional reason: the requested writ would impermissibly compel a continuing general course of conduct. The writ of prohibition “issues to arrest execution of a future, *specific act.*” *Riddle*, 193 Wn.2d at 429 (emphasis added). A writ cannot issue where it compels a “general course of conduct” and is not directed at a specific act or limited to a specific period of time. *Walker v. Munro*, 124 Wn.2d 402, 408, 879 P.2d 920 (1994). Petitioner’s requested writ would transform the bail process from an individualized determination, as mandated by RCW 10.19.055, to a “general course of conduct” by indefinitely inhibiting the Judges’ ability to set bail when issuing an arrest warrant upon the State’s filing of felony charges. The Judges would be required to follow a “general course of conduct” of merely rubber-stamping the district court’s bail determination—despite the district court having set bail based on less information and prior to charges being filed.⁵ Such a writ cannot lie.

⁵ Petitioner will likely argue that the Judges can increase bail after a contested hearing. However, such an argument ignores the practical realities of CrR 2.2. The superior court’s probable cause determination, issuance of an arrest warrant or summons, and setting of bail are part of the initiation of a criminal proceeding in superior court—it is not realistic (and often not possible) to notify a defendant in *advance* of the State filing formal charges. Requiring a contested bail hearing before setting bail in an arrest warrant could also result in longer delays between arrest and release, as well as delays to arraignment hearings. (*See App. A at ¶ 11*)

B. The Court should deny Petitioner’s alternative request for a writ of mandamus, because he cannot establish any of the requisite elements of this extraordinary remedy.

Like prohibition, mandamus is an extraordinary writ. *Walker*, 124 Wn.2d at 407. Mandamus will not lie unless (1) a government official has a clear duty to act, (2) the petitioner of the writ has no plain, speedy, and adequate remedy in the ordinary course of law, and (3) the petitioner is “beneficially interested.” *Colvin v. Inslee*, ___ Wn.2d ___, 467 P.3d 953, 961 (2020). This Court should deny Petitioner’s application for a writ of mandamus because he has failed to meet “the ‘demanding’ burden of proving all three elements justifying mandamus.” *Colvin*, 467 P.3d at 962.

1. The Judges have no duty to notify an accused of a probable cause hearing upon the filing of an Information or to adhere to the district court’s bail determination when setting bail in an arrest warrant.

As an extraordinary remedy, mandamus is “appropriate only where a state official is under a mandatory ministerial duty to perform an act required by law as part of that official’s duties.” *Freeman v. Gregoire*, 171 Wn.2d 316, 323, 256 P.3d 264 (2011); *Colvin*, 467 P.3d at 961 (“A writ of mandamus can only command what the law itself commands.”). The mandate “must specify the *precise thing* to be done or prohibited.” *Freeman*, 171 Wn.2d at 323 (emphasis added). “If the law does not require a government official to take a specific action, neither can a writ of mandamus.” *Colvin*, 467 P.3d at 961. For this reason, “mandamus may not

be used to compel the performance of acts or duties which involve discretion on the part of a public official.” *Walker*, 124 Wn.2d at 410.

Petitioner has failed to establish the precise “mandatory ministerial duty” that the “law itself commands” the Judges perform. As addressed *supra*, the Judges have no legal duty to adhere to a pre-charge bail determination made by the district court when issuing an arrest warrant upon the filing of formal charges. Nor do the Judges have a duty to notify an accused at the time the State files an Information and seeks an arrest warrant with bail. *See* CrR 2.2 (no requirement of notice to accused). Simply put, nothing in CrR 2.2 *requires* the Judges “to take a particular action” with respect to setting bail. *Colvin*, 467 P.3d at 961. Far from a “mandatory ministerial duty,” the Judges’ bail determination necessarily involves discretion. Mandamus cannot be used to compel the Judges’ discretionary performance of this act. *Walker*, 124 Wn.2d at 410.

2. A writ of mandamus cannot issue where, as here, a plain, speedy, and adequate remedy already exists in the ordinary course of law.

As set forth *supra*, a writ is not necessary to protect Petitioner’s rights or ensure full redress, *Riddle*, 193 Wn.2d at 434, because Petitioner’s claims are moot. Even if this were a live controversy, Petitioner would have adequate remedies to challenge a bail hearing determination: he could request an “emergency bail hearing” (App. A at ¶¶ 9-10) or file a motion

for an “expedited hearing” on the superior court’s bond hearing calendar; he could challenge the bail determination at the arraignment within 14 days of the State filing charges; or he could challenge a bail determination through the appellate process. Because Petitioner has an adequate remedy in the ordinary course of law, a writ of mandamus cannot lie.

3. Petitioner is not “beneficially interested” because his criminal case was dismissed and this action is moot.

An “individual has standing to bring an action for mandamus, and is therefore considered to be beneficially interested, if he has an interest in the action beyond that shared in common with other citizens.” *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 616, 62 P.3d 470 (2003). While Petitioner may have *previously* had a “beneficial interest” in the bail determination when the superior court issued a warrant for his arrest, the criminal case against Petitioner was dismissed in January 2019—over a full year before Petitioner brought this original action.

Dismissal of his criminal case rendered moot Petitioner’s claims regarding Judge Cayce’s bail determination. At that time, Petitioner lost standing to bring this original action as a live controversy. Commissioner Johnston of this Court expressly recognized that Petitioner’s claims in this action are moot. Because Petitioner’s criminal case has long since been dismissed and his claims here are moot, he no longer has “an interest in the

action beyond that shared in common with other citizens.” *Charles*, 148 Wn.2d at 616. The Court must deny mandamus where Petitioner is not “beneficially interested” in this action.

4. Mandamus will not lie to compel a general course of conduct.

As with prohibition, mandamus “will not lie to compel a general course of official conduct, as it is impossible for a court to oversee the performance of such duties.” *Walker*, 124 Wn.2d at 408 (quoting *State ex rel. Pacific Am. Fisheries v. Darwin*, 81 Wash. 1, 12, 142 P. 441 (1914)). It is “necessary to point out the very thing to be done,” as “*a command to act according to circumstances would be futile.*” *Walker*, 124 Wn.2d at 408 (emphasis added) (quoting *Pacific Am.*, 81 Wash. at 12).

Here, Petitioner seeks a writ compelling “a general course of official conduct”: that the Judges cannot set bail higher than that set by the district court without first providing notice and a contested bail hearing. At the same time, Petitioner’s requested writ would apparently allow the Judges to *lower* the bail set by the district court without notice to the defendant. Petitioner’s requested writ is nothing more than “a command to act according to circumstances.” *Walker*, 124 Wn.2d at 408. Not only would it be “impossible for a court to oversee the performance of such duties,” *Walker*, 124 Wn.2d at 408, but at its core, the requested writ simply directs

the Judges to comply with an accused's constitutional rights and protections when setting bail. "It is hard to conceive of a more general mandate than to order a state officer to adhere to the constitution." *Walker*, 124 Wn.2d at 408. The Court should deny a writ of mandamus.

C. The Judges are not engaged in an "unconstitutional procedure" or "ethical violations" by complying with CrR 2.2

This Court need not—and thus should not—consider Petitioner's constitutional arguments to resolve this action. Regardless, each of these arguments fails in turn, because the procedure authorized by CrR 2.2, and adhered to by the Judges, is both constitutional and in accord with ethical standards. This Court must deny a writ of prohibition or mandamus.

1. The Court should not consider Petitioner's constitutional arguments because they are not "absolutely necessary" to resolve this action.

This Court is "guided by 'the fundamental principle that if a case can be decided on nonconstitutional grounds, an appellate court should refrain from deciding constitutional issues.'" *Pasado's Safe Haven v. State*, 162 Wn. App. 746, 752, 259 P.3d 280 (2011) (quoted source omitted). As such, this Court "should not pass on constitutional issues unless *absolutely necessary* to the determination of the case," *State v. Hall*, 95 Wn.2d 536, 539, 627 P.2d 101 (1981) (emphasis added). This is particularly true in light of the "narrow inquiry" on whether a writ will issue: this Court "looks *not*

to the nature or extent of injury *but to the question of power and jurisdiction of an inferior court.*” *Riddle*, 193 Wn.2d at 429 (emphasis added).

The Court should decline to address Petitioner’s constitutional arguments because it is undisputed that the Judges had, and have, the “power and jurisdiction” to set bail in a felony criminal case. The Judges did not exceed their jurisdiction by complying with court rules and statutes. A writ of prohibition cannot lie on those grounds alone. The Court need not reach Petitioner’s constitutional or “ethical” arguments challenging the process authorized by CrR 2.2 to resolve the “narrow inquiry” before it. Regardless, each of Petitioner’s constitutional arguments fail.

2. The procedures authorized by CrR 2.2 do not violate the right to counsel under the federal or state constitutions.

Petitioner did not have a constitutional right to counsel at the superior court’s probable cause determination because the State’s filing of an Information is the initiation of the formal judicial proceedings. As such, the right to counsel did not attach until *after* the State filed charges. Additionally, a probable cause determination is a nonadversary proceeding and not a “critical stage” necessitating a right to counsel.

a. The right to counsel in the superior court does not attach until the State files charges in the superior court.

It has been “firmly established” that a person’s Sixth and Fourteenth Amendment right to counsel attaches “only at or after the initiation of adversary judicial criminal proceedings against the defendant by way of formal charge, preliminary hearing, indictment, information, or arraignment.” *State v. Earl*, 116 Wn.2d 364, 373 n.5, 805 P.2d 211 (1991) (emphasis added). The right to counsel under article I, section 22 of the state constitution “also attaches only after the initiation of formal judicial proceedings.” *Earl*, 116 Wn.2d at 373 n.5 (citing *Heinemann v. Whitman County*, 105 Wn.2d 796, 799-800, 718 P.2d 789 (1986)).⁶ The Sixth Amendment right to counsel thus attaches after formal proceedings have been initiated, regardless of whether accused is in custody. *State v. Stewart*, 113 Wn.2d 462, 473-74, 780 P.2d 844 (1989).

The “initiation of judicial criminal proceedings is far from a mere formalism”: “[i]t is the starting point of our whole system of adversary criminal justice.” *State ex rel. Juckett v. Evergreen Dist. Court, Snohomish*

⁶ “The right to counsel under article I, section 22 (amendment 10) of the Washington Constitution does not provide more protection than the Sixth Amendment.” *State v. Corn*, 95 Wn. App. 41, 62-63, 975 P.2d 520 (1999) (citing *Earl*, 116 Wn.2d at 373 n.5); see also *Tacoma v. Heater*, 67 Wn.2d 733, 736, 409 P.2d 867 (1966) (right to counsel is the same under the Sixth Amendment and article I, section 22 of the state constitution). For the sake of brevity, the Judges refer to the right to counsel under both constitutions as the “Sixth Amendment right to counsel.”

County, 100 Wn.2d 824, 828, 675 P.2d 599 (1984) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689-90, 92 S. Ct. 1877, 32 L.Ed.2d 411 (1972)). It is only at that time, when “the government has committed itself to prosecute,” that the adverse positions of government and defendant have solidified.” *Juckett*, 100 Wn.2d at 828 (quoting *Kirby*, 406 U.S. at 689).

The district court’s jurisdiction and authority here was limited. The preliminary appearance at the district court did not initial formal adversary proceedings against Petitioner, because the State had not yet “committed itself to prosecute” by filing charges. *Stewart*, 113 Wn.2d at 468. Accordingly, “regardless of what is done by the magistrate, the prosecuting attorney can file an information in superior court.” *State v. Passafero*, 79 Wn.2d 495, 497, 487 P.2d 774 (1971). Petitioner’s conditions of release notified him that the State could, at a later date, file formal charges against him. (AR 13) Unless and until the State did so, Petitioner had no Sixth Amendment right to counsel because the “adverse positions of government and defendant ha[d] [not] solidified.” *Stewart*, 113 Wn.2d at 468.

For this reason, Petitioner misplaces his reliance on *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 128 S. Ct. 2578, 171 L.Ed.2d 366 (2008) (Pet. Br. 31-34) In *Rothgery*, a Texas magistrate made a probable cause determination, set bail, and “formally appraised” the accused of the accusation against him. 554 U.S. at 195. The bond that the accused posted

expressly stated that “Rothgery stands charged by complaint duly filed” and listed the felony charge the State had filed against him. 554 U.S. at 196 (emphasis added). Because a complaint had been filed, the Court held that the accused’s Sixth Amendment right to counsel had attached. *See* 554 U.S. at 199 n.9. The fact that a complaint had been filed in *Rothgery* is critical to the Sixth Amendment analysis. In contrast, no complaint—formal or otherwise—had been filed here. Petitioner expressly acknowledged in his Conditions of Release that “CHARGES HAVE NOT BEEN FILED ON THIS INVESTIGATION” but that “THE STATE MAY FILE CHARGES AT A LATER DATE.” Petitioner’s Sixth Amendment right to counsel was not implicated where no formal charges had been filed in the district court.

b. The probable cause determination at which an arrest warrant is issued and bail set is not a “critical stage” of the proceedings.

Even when the Sixth Amendment right to counsel attaches, the refusal of the right to counsel “must have occurred at a ‘critical stage’ in the pretrial proceedings.” *State v. Louie*, 68 Wn.2d 304, 308, 413 P.2d 7 (1966). Additionally, that refusal must have “resulted in some reasonably discernable prejudice to the effectiveness of legal assistance ultimately furnished the accused.” *Louie*, 68 Wn.2d at 308-09. In other words, “the courts must look to substance rather than labels in ascertaining whether

constitutional rights to the assistance of counsel have been violated.” *Louie*, 68 Wn.2d at 309.

The filing of an Information initiates formal criminal proceedings—*after* which point the Sixth Amendment right to counsel exists.⁷ *Stewart*, 113 Wn.2d at 473-74. There is no right to counsel *at* the filing of an Information or a grand jury proceeding. *See U.S. v. Mandujano*, 425 U.S. 564, 581, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976) (no Sixth Amendment right to be present or have counsel present for grand jury proceedings); *Gerstein v. Pugh*, 420 U.S. 103, 122, 95 S. Ct. 854, 43 L.Ed.2d 54 (1975) (no right to counsel at probable cause determination). CrR 2.2 thus does not violate the Sixth Amendment right to counsel by allowing the Judges to make a probable cause determination, issue an arrest warrant, and, where appropriate, set bail without notice to the accused.

The U.S. Supreme Court has made it unequivocally clear that a probable cause determination “is not a ‘critical stage’ in the prosecution that would require appointed counsel” because of “its limited function and its nonadversary character.” *Pugh*, 420 U.S. at 122. Rather, the Court “has

⁷ In Washington, the filing of an Information serves the same purpose as a grand jury proceeding: both result in a determination of probable cause and issuance of an arrest warrant. *See State v. Beck*, 56 Wn.2d 474, 476, 349 P.2d 387 (1960) (“prosecutor’s information has become the standard means of bringing charges in this state, as in all other states which authorize its use”; “there is no denial of Federal constitutional rights involved in the substitution of the prosecutor’s information for the grand jury’s indictment.”), *aff’d*, 369 U.S. 541, 82 S. Ct. 955, 8 L.Ed.2d 98 (1962).

identified as ‘critical stages’ those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel.” *Pugh*, 420 U.S. at 103.

A defendant’s “defense on the merits” is not impaired by not being present with counsel when probable cause is determined, a warrant is issued, and bail is set. In *Passafero*, a procedurally similar case, the defendant had a preliminary hearing in the district court where he was represented by retained counsel. The defendant was allowed to post bond of \$100. While free on bond, the defendant was arrested on separate charges. The matter was subsequently bound over to superior court, where “bail was increased to \$3,000.” 79 Wn.2d at 497. An information was later filed in superior court, counsel was appointed, and the defendant was convicted after a trial.

On appeal, the defendant argued that the charge against him should have been dismissed “because of the failure to provide counsel at the time [he] was bound over and his bail increased.” *Passafero*, 70 Wn.2d at 497. Recognizing that the defendant “was represented by counsel at the preliminary hearing” in the district court, this Court noted that “[o]ur statutes provide that all public offenses may be prosecuted in the superior court by information filed by the prosecuting attorney.” *Passafero*, 70 Wn.2d at 497 (quoted source omitted). Where the criminal complaint charged a felony, “the justice of the peace could only sit as a committing

magistrate.” *Passafero*, 70 Wn.2d at 497 (quoted source omitted). Accordingly, this Court held that the “binding over to superior court was not a critical stage of the proceedings and consequently, the failure to provide counsel at that stage was not error.” *Passafero*, 70 Wn.2d at 497.

Here, Judge DeLaurenti made a pre-charge bail determination. Like in *Passafero*, Petitioner was represented by counsel at the district court’s preliminary hearing.⁸ However, “[r]egardless of what is done” by the district court as committing magistrate, the State could always file an information in the superior court and initiate formal criminal proceedings against Petitioner. *Passafero*, 79 Wn.2d at 497. When the State did exactly that and brought felony charges against Petitioner, jurisdiction vested in the superior court and the district court matter bound over to the superior court.

At the time the case bound over upon the filing of an information, the superior court has authority to “issue a warrant for the arrest of the defendant.” CrR 2.2(a). The “judge issuing the warrant will determine

⁸ While CrRLJ 3.2.1(e) requires the district court “to provide the defendant with a lawyer and to orally inform the defendant of the nature of the charges against him, the right to a lawyer at every stage of the proceedings, and the right to remain silent,” these “pretrial rules provide enhanced *procedural* protections to people accused of crimes.” *Khandelwal v. Seattle Mun. Court*, 6 Wn. App. 2d 323, 334, 431 P.3d 506 (2018) (emphasis added). However, these pretrial rules are not constitutional rights; “they are in *addition* to the constitutional right to a prompt probable cause and bail determination.” *Khandelwal*, 6 Wn. App. at 334 (emphasis added) (noting that the “procedural protections codified in CrRLJ 3.2.1(d) and (e) are *distinct* from the constitutional deadline for making a probable cause determination . . . and serve a very different purpose”) (emphasis added).

probable cause and set bail.” *Westerman*, 125 Wn.2d at 288. As this Court held in *Passafero*, there is no right to counsel because this binding over stage of the proceedings is not “critical.” While the Judges recognize that these proceedings are neither unimportant nor insignificant to the accused individual, the law is unequivocally clear that this stage of the criminal proceedings is not “critical” for purposes of the Sixth Amendment right to counsel. This is because the absence of effective counsel at a probable cause determination does not impair the accused’s “defense on the merits if the accused is required to proceed without counsel.” *Pugh*, 420 U.S. at 103.

There was also no “reasonably discernable” prejudice to the legal assistance Petitioner ultimately received in either the district court or superior court. *See Louie*, 68 Wn.2d at 309 (noting that confessions, admissions, or incriminating statements elicited from the defendant after he was refused counsel may constitute prejudice). Petitioner invoked his Fifth Amendment right to an attorney and to remain silent when he was arrested. He appeared with counsel at the preliminary district court hearing, where he did not even contest his probable cause determination. Plaintiff posted the bond for his bail on the very day the arrest warrant was issued. At no time did he make any confessions, admissions, or incriminating statements when he was refused a right to counsel. Crucially, Petitioner was never convicted of the charges brought against him and the State dismissed those

charges. Petitioner was indisputably not deprived of effective legal assistance in violation of the Sixth Amendment.

3. The procedures authorized by CrR 2.2 do not violate the Fifth Amendment because the Fifth Amendment's due process clause does not apply to the states.

As an initial matter, Petitioner fails to even identify which Fifth Amendment right he claims CrR 2.2 violates, let alone provide any argument on the merits. (*See* Pet. Br. 28, 36) This Court should decline to consider this conclusory argument. *See State v. Barry*, 183 Wn.2d 297, 312-13, 352 P.3d 161 (2015) (“We generally consider a constitutional argument inadequate if the argument’s proponent cites only to general constitutional ideas without specific citations and support.”); *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012) (appellate courts “do not consider conclusory arguments unsupported by citation to authority”), *rev. denied*, 176 Wn.2d 1014 (2013); RAP 10.3(a)(6); RAP 10.4.

Regardless, Petitioner’s Fifth Amendment argument fails on the merits. While it is unclear given the absence of any argument or authority in support of his Fifth Amendment claim, it appears that Petitioner may be arguing that the Judges’ compliance with CrR 2.2 violates his Fifth Amendment right to due process under the federal constitution.⁹ (*See* Pet.

⁹ The Fifth Amendment’s right to due process is the only provision that could even potentially be applicable to the facts of this case. While the Fifth Amendment right against self-incrimination “requires that the accused be warned of his

Br. 28: arguing that the superior court’s issuance of an arrest warrant “without notice or hearing, violates the Fifth”) This argument fails as a matter of law. CrR 2.2 does not and cannot violate Petitioner’s Fifth Amendment rights under the federal constitution because the “Fifth Amendment’s due process clause has no application to the states.” *Barry*, 183 Wn.2d at 312. As such, CrR 2.2 does not violate Petitioner’s Fifth Amendment right to due process.

4. The procedures authorized by CrR 2.2 do not violate the right to due process under the Fourteenth Amendment.

It is again unclear from his passing treatment of the issue whether Petitioner also contends that the Judges’ compliance with the procedures set forth in CrR 2.2 violated his Fourteenth Amendment right to due process independently from, and in addition to, his right to counsel under the Sixth Amendment (as applied to the states through the Fourteenth Amendment).¹⁰ While this Court should not even consider this conclusory argument on the merits, *Barry*, 183 Wn.2d at 312-13, the argument is nevertheless fatally

constitutional right to have counsel present during this inherently coercive process” of interrogation, this “right to counsel exists solely to guard against coercive, and therefore unreliable, confessions obtained during in-custody interrogation.” *State v. Stewart*, 113 Wn.2d at 473, 478. Petitioner was not, and has never alleged that he was, interrogated—let alone that he was interrogated without being informed of his right to counsel. To the contrary, Petitioner invoked his right to counsel immediately upon his arrest. (AR 21)

¹⁰ Petitioner appears to argue that he had a right, “under the Fourteenth Amendment, to be present ‘at any stage of the criminal proceeding that is critical to its outcome.’” (Pet. Br. 31, quoted source omitted)

flawed because the validity of the warrant and bail is subject to a *Fourth* Amendment analysis—and Petitioner has never attacked the validity of the warrant.

An arrest warrant issued by a court “upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense and thus the warrant primarily serves to protect an individual from an unreasonable seizure.” *State v. Parks*, 136 Wn. App. 232, 237, 148 P.3d 1098 (2006) (quoting *Steagald v. United States*, 451 U.S. 204, 213, 101 S. Ct. 1642, 68 L.Ed.2d 38 (1981)). “Prior to the issuance of an arrest warrant, a defendant is not afforded the right to exercise any due process rights.” *State v. Townsend*, 2 Wn. App. 2d 434, 440, 409 P.3d 1094 (2018). *See also State v. Barker*, 162 Wn. App. 858, 864, 256 P.3d 463 (2011) (noting that defendant “provides no authority for his assertion that due process notice requirements apply when a warrant issues”).

Thus, where the “legal process itself goes wrong” and “has done nothing to satisfy the Fourth Amendment’s probable-cause requirement,” the Fourth Amendment violation does not “somehow . . . convert that claim into one founded on the Due Process Clause.” *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 918, 197 L.Ed.2d 312 (2017). Rather, “[i]f the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth

Amendment.” *Manuel*, 137 S. Ct. at 919. Petitioner has never alleged that his Fourth Amendment rights were violated, thereby waiving this argument.

In any event, neither the Fourteenth nor Fourth Amendments are violated where, as here, the probable cause determination is “made by a judicial officer either before or promptly after arrest.” *Baker v. McCollan*, 443 U.S. 137, 144-45, 99 S. Ct. 2689, 61 L.Ed.2d 433 (1979) (quoted source omitted). Contrary to Petitioner’s claims, “an adversary hearing is not required”; the U.S. Supreme Court has expressly “reject[ed] the contention that a defendant is entitled to an adversary hearing on the question of probable cause to detain.” *Baker*, 443 U.S. at 143 & n.2. Probable cause for arrest “can be determined reliably without an adversary hearing”:

That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.

Pugh, 420 U.S. at 120.

Even where a defendant “was indeed deprived of his liberty for a period of days,” an improper detention “gives rise to no claim under the United States Constitution” if such deprivation “was pursuant to a warrant conforming . . . to the requirements of the Fourth Amendment.” *Baker*, 443 U.S. at 143-44. Petitioner has never “attack[ed] the validity of the warrant

under which he was arrested.” *Baker*, 443 U.S. at 143. Nor could he. A warrant is invalid only “if it is not issued by a neutral and detached magistrate; is not based on probable cause; or if the court lacks authority to issue it.” *State v. Hatchie*, 133 Wn. App. 100, 116, 135 P.3d 519 (2006), *aff’d*, *State v. Hatchie*, 161 Wn.2d 390, 166 P.3d 698 (2007). Crucially, “[s]uch failings go to the constitutional heart of the warrant; ***a type of bail provision does not.***” *Hatchie*, 133 Wn. App. at 116-17 (emphasis added). CrR 2.2 authorizes the Judges, as neutral and detached magistrates, to issue a warrant. The judge issuing the warrant “will determine probable cause and set bail.” *Westerman*, 125 Wn.2d at 288. This procedure authorized by CrR 2.2, and followed by the Judges, is entirely consistent with the due process requirements of the Fourteenth and Fourth Amendments.

5. The procedures authorized by CrR 2.2 do not violate the state constitution.

a. CrR 2.2 does not require or impose excessive bail.

Aside from a passing citation to the state constitution, Petitioner does not provide any argument or authority as to how the \$50,000 bail provision in warrant for Petitioner’s arrest violates article I, section 14’s prohibition against excessive bail. Once again, this Court should decline to consider Petitioner’s conclusory constitutional arguments. *Barry*, 183 Wn.2d at 312-13; *see also Holland v. City of Tacoma*, 90 Wn. App. 533,

538, 954 P.2d 290 (1998) (“Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.”).

Regardless, this argument fails on the merits. Nowhere in his opening brief does Petitioner claim that the \$50,000 bail set by Judge Cayce in the superior court was “excessive” or “cruel.” Nor could he. The State initially asked for bail to be set at \$150,000 in the district court prior to any charges being filed. Judge DeLaurenti expressly noted at the time that “[t]he State’s recommendation for bond is not unreasonable.” (AR 8) Rather than renew this request after filing charges, the State instead sought \$50,000 bail. Judge Cayce was well within his discretion to set bail at that amount after finding probable cause and reviewing all of the information provided by the State.

Simply put, the Judges have discretion in setting bail. *Westerman*, 125 Wn.2d at 288-90. Even if the Judges abuse that discretion by setting an excessive or improper bail, because they “had jurisdiction of subject-matter, prohibition will not lie to prevent an erroneous exercise of that jurisdiction.” *Kennan*, 35 Wash. at 54. Accordingly, the Judges’ exercise of their discretion to set bail does not violate article I, section 20.

b. CrR 2.2 does not violate article I, section 20, which authorizes bail to be posted by bond.

Petitioner once again fails to provide any argument or authority in support of his conclusory statement that the Judges' setting of bail at the time of issuing an arrest warrant pursuant to CrR 2.2 somehow violates article I, section 20 of the state constitution. This Court should decline to consider this conclusory constitutional challenge. *Barry*, 183 Wn.2d at 312-13. Regardless, article I, section 20 is inapplicable. Article I, section 20 provides that “[a]ll persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evidence, or the presumption is great.”¹¹ This provision thus “guarantees the option of seeking to make bail via a surety, which involves a third-party promise and not merely the deposit of cash or equivalent property with the court.” *Barton*, 181 Wn.2d at 162.

The arrest warrant at issue here clearly stated: “Bail fixed in the sum of \$50,000.00 **Cash or Surety Bond**. Cash or Surety Bond to be approved by the Court.” (AR 32, emphasis in original) It is undisputed that Petitioner posted bond on April 19, 2018. (AR 32; Pet. Br. 10) Accordingly, nothing in the arrest warrant violated Petitioner’s rights under article I, section 20 of the state constitution.

¹¹ Article I, section 20 also sets forth when “[b]ail may be denied for offenses punishable by the possibility of life in prison.” This provision is clearly inapplicable here, as Petitioner was neither denied bail nor charged with a capital offense.

6. The procedures authorized by CrR 2.2 do not violate any ethical rules.

Finally, the procedures authorized by CrR 2.2 and followed by the Judges do not and cannot violate Code of Judicial Conduct Rule 2.9 (“Rule 2.9”). Under Rule 2.9, a judge “shall not initiate, permit, or consider ex parte communications . . . concerning a pending or impending matter.” Rule 2.9(A). As an initial matter, Petitioner cites to no authority suggesting that a violation of “ethical rules” warrant the extraordinary remedy of prohibition or mandamus. Nor could it.

A writ of prohibition lies only in the absence of jurisdiction. It is undisputed that the Judges of King County Superior Court have original jurisdiction over all criminal proceedings. The canons of judicial conduct have no bearing on the Judges’ *jurisdiction* to issue an arrest warrant and fix bail. Accordingly, even if the Judges *did* violate Rule 2.9 (and they did not), any such violation does not divest them of their jurisdiction under article IV, section 6 of the state constitution. Accordingly, a writ of prohibition cannot lie for a violation of an ethical rule.

Similarly, the violation of ethical rules does give rise to mandamus. Rule 2.9 does not impose upon the Judges a “*mandatory ministerial duty to perform an act required by law.*” *Freeman*, 171 Wn.2d at 323 (emphasis added). Rule 2.9 in fact *prohibits* the Judges from performing an act—i.e., engaging in ex parte communications in various circumstances. Mandamus

cannot be used to “command” the Judges “to act according to circumstances.” *Pacific Am.*, 81 Wash. at 12.

Additionally, the State’s filing of an Information and the Judges’ issuance of a warrant or summons is not an “ex parte communication.” It is the initiation of the criminal proceedings and serves as a “review process” for the Judges to review the district court’s “pre-charging bail decision,” as well as “additional information” such as “other known pending or potential charges against the defendant, the defendant’s criminal record, and any other facts deemed material to the issue of pretrial release.” (App. A at ¶ 7) “This review process is nonadversarial, and not considered an ‘ex parte communication.’” (App. A at ¶ 7)

Even if the filing of initial charges, issuance of an arrest warrant, and fixing of bail *were* considered an “ex parte communication,” Rule 2.9 allows a judge to “initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.” Rule 2.9(A)(5).¹² The Judges’ jurisdiction is invoked upon the State’s filing of an Information. At that time, the Judges are “expressly authorized” by law—specifically, CrR 2.2—to make a probable cause determination, issue an arrest warrant, and set bail without the defendant being present. *See State v. Hudson*, 130 Wn.2d 48,

¹² To the Judges’ knowledge, the Judicial Conduct Commission has never taken the position nor issued an opinion that the process authorized by CrR 2.2 violates any ethical rule.

55, 921 P.2d 538 (1996) (“The authority and requirements for an arrest warrant or a summons in a state criminal proceeding are governed by CrR 2.2.”); *see also* RCW 10.31.060 (“Whenever any person or persons shall have been indicted or accused on oath of any public offense . . . and a warrant of arrest shall have been issued . . . any judge of . . . the superior court may indorse thereon an order signed by him or her . . .”).

Petitioner misplaces his reliance on CrR 3.2(l)(1). (Pet. Br. 37) CrR 3.2(l) provides that “[t]he court *ordering the release of an accused* on any condition . . . may at any time on change of circumstances, new information or showing of good cause amend its order to impose additional or different conditions for release.” (emphasis added) Pursuant to CrR 3.2(l)(1), the court “shall order the accused to appear for immediate hearing or issue a warrant directing the arrest of the accused for immediate hearing for reconsideration of conditions of release” on the court’s own motion “or a verified application by the prosecuting attorney alleging with specificity that an accused has willfully violated a condition of the accused’s release.”

Petitioner’s reliance on CrR 3.2(l) thus fails for two reasons. First, the superior court was not the “court ordering the release of an accused.” The *district court* ordered Petitioner’s release on his own personal recognizance. Second, and relatedly, Judge Cayce here did not issue an arrest warrant pursuant to CrR 3.2(l)(1). Judge Cayce issued the arrest

warrant pursuant to CrR 2.2(c) and RCW 10.31.060. (AR 32; *see also* AR 24: superior court finding probable cause “pursuant to CrR 2.2(a)”). The Judges’ arrest warrant is separate and distinct from a warrant issued by the district court for the limited purpose of “directing the arrest of the accused for immediate hearing for reconsideration of conditions of release.” CrR 3.2(l)(1).

Additionally, to the extent that the Judges’ compliance with CrR 2.2 constitutes an “ex parte communication,” Rule 2.9 allows a judge to engage in ex parte communication “for scheduling, administrative, or emergency purposes.” Rule 2.9(A)(1). Under this exception, the judge must “reasonably believe[] that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication.” Rule 2.9(A)(1)(a). The judge must also “make[] provision promptly to notify all other parties of the substance of the ex parte communication, and give[] the parties an opportunity to respond.” Rule 2.9(A)(1)(b).

First, CrR 2.2 is a nonadversarial “review process.” (App. A at ¶ 7) Underscoring the largely administrative nature of this process, Judges “may direct the clerk to issue a warrant for the arrest of the defendant” if “an information is filed.” CrR 2.2(a)(1). Second, Petitioner fails to articulate how the State “gain[s] a procedural, substantive, or tactical advantage” by initiating a criminal proceeding against a defendant and obtaining an arrest

warrant or summons to ensure that the defendant appears in superior court. CrR 2.2(c) (upon finding probable cause, the superior court “shall command that the defendant be arrested and brought forthwith before the court issuing the warrant”); *Barton*, 181 Wn.2d at 167 (discussing whether the bail bonding system adequately ensures the accused’s appearance). The State and the Judges comply with CrR 2.2 to formally initiate criminal proceedings against defendants and ensure that probable cause exists to support the charges. For instance, far from seeking to “gain an advantage” here (Pet. Br. 38), the State informed Judge Cayce in the charging documents that it had originally sought \$150,000 bail in the district court. (AR 17) Yet, despite Judge DeLaurenti noting that \$150,000 was “not unreasonable” (AR 8), the State did not renew its request for \$150,000 bond in the superior court. Instead, the State asked for only one-third of the bail it had requested in the district court. (AR 17)

Additionally, the superior court’s order “makes provision promptly to notify” the defendant of the “substance” of the “communication”—i.e., the charges filed against the defendant and the warrant or summons issued. The superior court’s order finding probable cause, directing issuance of a warrant, fixing bail contains an express provision that the State “has attempted to ascertain the defendant’s current address.” (AR 24) This provision aims to ensure that the defendant will promptly receive notice of

the warrant. The defendant will then have “an opportunity to respond,” Rule 2.9(A)(1)(b), at the arraignment or a contested bail hearing. *See* CrR 4.1(a)(1) (arraignment must occur within 14 days after the date the information or indictment is filed if the defendant is detained or subject to conditions of release); CrR 4.2 (defendant can answer charges by pleading “not guilty, not guilty by reason of insanity, or guilty”).

IV. CONCLUSION

The Court should deny Petitioner’s application for a writ of prohibition or, alternatively, mandamus. To the extent that this Court believes any remedy is necessary, the Court should address the procedure authorized by CrR 2.2 through its administrative rule-making authority—not through an extraordinary writ.

DATED this 4th day of September, 2020.

CORR CRONIN LLP

s/ Steven W. Fogg
Steven W. Fogg, WSBA No. 23528
Victoria E. Ainsworth, WSBA No. 49677

*Attorneys for Respondent The Judges of the
King County Superior Court*

CERTIFICATE OF SERVICE

The undersigned certifies as follows:

On this date, I caused a true and correct copy of the foregoing BRIEF OF RESPONDENT THE JUDGES OF THE KING COUNTY SUPERIOR COURT to be served via the Appellate Court E-File Portal and e-mail on the following attorneys of record herein:

David Allen
Todd Maybrown
Cooper Offenbecher
Danielle Smith
Allen, Hansen, Maybrown, & Offenbecher, P.S.
600 University Street Suite 3020
Seattle, WA 98101
david@ahmlawyers.com
todd@ahmlawyers.com
cooper@ahmlawyers.com
danielle@ahmlawyers.com
Attorneys for Petitioner Julian Pimentel

Ann M. Summers
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney
500 Fourth Avenue, Suite 900
Seattle, WA 98104
ann.summers@kingcounty.gov
*Attorneys for Respondent
King County Prosecuting Attorney*

Pamela B. Loginsky
pamloginsky@waprosecutors.org
Attorney for Washington Association of Prosecuting Attorneys

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

DATED this 4th day of September, 2020, at Seattle, Washington.

s/ Donna Patterson

Donna Patterson

CORR CRONIN MICHELSON BAUMGARDNER FOGG &

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