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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.

PETITIONER'S OPENING BRIEF

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I. **THE KING COUNTY PROCEDURE, WHEREBY THE STATE SCHEDULES THE FIRST APPEARANCE OF A PERSON ARRESTED ON PROBABLE CAUSE OF COMMITTING A FELONY BEFORE A KING COUNTY DISTRICT COURT JUDGE, AND IF IT IS UNSATISFIED WITH THE COURT'S DECISION AS TO BAIL, SUBMITS THE MATTER TO A SUPERIOR COURT JUDGE, EX PARTE, WITHOUT NOTICE TO THE DEFENDANT OR COUNSEL, AND REQUESTS A BAIL INCREASE AND CONTROLS WHAT INFORMATION THE SUPERIOR COURT JUDGE RECEIVES, IS UNCONSTITUTIONAL, VIOLATES ETHICS RULES AND MUST BE PROHIBITED**

A. **Introduction**

This is an Application for a Writ of Prohibition or, alternatively, Mandamus against the Judges of the King County Superior Court (Judges) and Dan Satterberg, King County Prosecuting Attorney. Petitioner Julian Pimentel is requesting that this Court issue a Writ of Prohibition, or, alternatively, a Writ of Mandamus, prohibiting the King County Superior Court Judges from raising bail at an *ex parte* proceeding, without notice or input from defense counsel, where bail was previously set at a contested hearing in King County District Court at petitioner's first appearance following an arrest based on probable cause, and where there was no claim that the Petitioner violated his conditions of release. Petitioner is also requesting that the King County Prosecuting Attorney's Office (KCPAO) be prohibited from making such *ex parte* requests. As will be shown, *infra*,

this has been a persistent, ongoing issue in King County for at least a quarter of a century in spite of defense counsels' efforts to reform this system through negotiations with the elected prosecutor and the judges.¹

In support of this Petition, Petitioner relies upon the Declarations of David Allen (second Dec'l), Amy Muth, Emily Gause (first amended) and Robert Goldsmith detailing their respective clients' bail being increased, *ex parte*, through the operation of this unconstitutional procedure.

B. Facts of Petition

1. Charges in *State v. Pimentel*

Petitioner Julian Pimentel was charged by Information with Assault in the Second Degree with Sexual Motivation. The Information, filed on April 19, 2018, alleged that on April 17, 2018 he committed assault in the second degree with intent to commit the felony of indecent liberties on ARW, who was physically helpless or mentally incapacitated.² At the time ARW would have been approximately 15-1/2 years old.³ ARP 018-021.

¹ See herein § C(1) *infra* and Allen Dec'l at ARP (Agreed Report of Proceedings) at 038, 044-067.

² There was an obvious scrivener's error in the Information, which erroneously alleged that the incident occurred on April 17, 2018, which is the date Petitioner voluntarily surrendered. Det. Adam's Certification for Determination of Probable Cause states that the incident occurred on February 10, 2018, which would have been two days after Petitioner turned 18 years old. See ARP 018.

³ Because Petitioner's and ARW's age differential was less than four years, sexual intercourse would not have been illegal but for the allegation that ARW was incapable of consent due to her level of intoxication pursuant to RCW 9A.44.079.

2. Facts relating to Ex Parte Raising of Previously Set Bail in the Pimentel Matter

ARW claimed that Petitioner had sexual intercourse with her when she was incapacitated due to her intoxication. The case was investigated by Federal Way Police Department Detective Richard Adams. Detective Adams sent a letter to Petitioner directing him to surrender or be arrested on probable cause. Accompanied by his father, Adrian Pimentel, who is an attorney, Julian surrendered to the Federal Way Police Department on April 17, 2018 and he was arrested and booked into the King County Jail. ARP 011.

Pursuant to longstanding King County procedure, Petitioner Julian Pimentel's first appearance was before a King County District Court Judge the next day, April 18, 2018.⁴ The prosecutor requested bail in the sum of \$150,000. Defense attorney David Allen appeared and argued for a PR release, informing the judge that the jail PR screeners recommended a PR release; that Detective Adams stated in his report filed with the court that he had no objection to release; that Petitioner was just two months over the age of 18; he had no criminal convictions; he had a stable address and lived

⁴ CrR 3.2.1 and CrRLJ 3.2.1(a) create concurrent jurisdiction in both Superior or District Court for the first appearance of a felony suspect arrested on probable cause. *See: State v. Stevens County District Court Judge*, 194 Wn.2d 898 (2019). Many counties schedule first appearances in Superior Court, thereby avoiding the problems existing in King County. *See* Second Allen Dec'l, ARP 038, 046; Gause Dec'l, ARP 074-076; Goldsmith Dec'l, ARP 071-072.

with his father, who was an attorney practicing in Kitsap County; and, that there was nothing predatory alleged. The court heard from Plaintiff's father, Adrian Pimentel, who confirmed that his son had a stable address, no prior convictions and assured the Court he would appear. ARP 001-010 (VRP of Petitioner's April 18, 2018 First Appearance).

District Court Judge Charles Delaurenti followed the recommendations of the defense and the jail's PR screener and released Petitioner on his personal recognizance, with conditions, and also entered a Sexual Assault Protection Order. ARP 013-015. Pursuant to District Court procedure, a return date was set and he was ordered to return to court the next day, April 19, 2019 for his second appearance. ARP 013; 014-15.

Because the arrest was based on probable cause, at this stage the prosecuting attorney had not formally filed a charge. The next day, the State electronically filed an Information in Superior Court charging Assault in the Second Degree with intent to commit a felony, with Sexual Motivation. ARP 016-017. In its Superior Court filing, the Senior Deputy Prosecuting Attorney ("DPA"), without notice to the defense, made an *ex parte* request that bond be raised to \$50,000 and that an arrest warrant be entered. In support of this, she filed a "Prosecuting Attorney Case Summary and Request for Bail/Or Conditions of Release." ARP 017.

The DPA stated in her request for increase of bail that her office had requested bail of \$150,000 at the first appearance the day before but the District Court judge released the defendant on his personal recognizance. The DPA then wrote that at the first appearance the court did not have the Certification for Determination of Probable Cause (hereinafter, “Certificate”) and was therefore unaware that there were statements from complainant’s friends who were with the victim and the defendant that day, which the DPA claimed was “new information” justifying the bail increase from a PR to \$50,000. The DPA wrote:

Pursuant to CrR 2.2(b)(2)(ii), the State requests a warrant because the defendant is likely to commit a violent offense. At the time of first appearance the State requested \$150,000.00. The court did not grant bail and released the defendant on his personal recognizance. **At the time of first appearance the court was unaware that there were statements from friends that were with the victim and the defendant that day. In the certification for determination of probable case [sic], which provides much more detail of the events of the day, the friends state that the victim was impaired both earlier in the day and during the time frame when the sexual assault occurred. The victim is only fifteen years old and was supplied liquor by the defendant, which witnesses report that he stole. Given the new information from friends regarding the victim’s impairment the State respectfully requests the court set bail in the amount of \$50,000.00.** The State is also seeking a sexual assault protection order for the victim. (Emphasis supplied.)

ARP 017.

This statement by the Senior DPA in her *ex parte* request for increase in bail was misleading, inaccurate, erroneous and also irrelevant to the setting of bail. The transcript of the April 18, 2018 District Court hearing demonstrates that the District Court judge was provided with a copy of the so-called “Superform,” which contained a shortened one paragraph version of the Certification for Determination of Probable Cause, which was entitled “Statement of Probable Cause.” ARP 003; 011-012.

The District Court judge stated on the record at the first appearance that he had “read the Affidavit of Probable Cause.” ARP 3.⁵ Therefore, the statement by the DPA referencing the so-called “new” information about corroboration of the complainant’s allegations in the Certification for Determination of Probable Cause was not new at all but instead contained in the Statement of Probable Cause (ARP 012) reviewed and considered by the District Court judge at the time of the first appearance hearing the prior day. ARP 003; 011-012.

These erroneously entitled “new facts” contained in the Certificate which the DPA argued justified the bond increase did not bear at all upon any of the CrR 3.2 considerations that a judge would review for a bail determination.⁶

⁵ The pleading has been variously referred to as both the Statement of Probable Cause and an Affidavit of Probable Cause. They refer to the same document. ARP 012.

⁶ These ‘new facts’ were not even arguably relevant to a determination of probable cause,

This “new” information about corroborating the complainant’s story was not relevant to an increase in bond, as a reading of the relevant portions of CrR 3.2, “Release of Accused,” demonstrates:

- (a) Presumption of Release in Noncapital Cases.** Any person, other than a person charged with a capital offense, shall at the preliminary appearance or reappearance pursuant to rule 3.2.1 or CrRLJ 3.2.1 be ordered released on the accused’s personal recognizance pending trial unless:
- (1) the court determines that such recognizance will not reasonably assure the accused’s appearance, when required, or
 - (2) there is shown a likely danger that the accused:
 - (a) will commit a violent crime, or
 - (b) will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.

For the purpose of this rule, “violent crimes” are not limited to crimes defined as violent offenses in RCW 9.94A.030.

In making the determination herein, the court shall, on the available information, consider the relevant facts including, but not limited to, those in subsections (c) and (e) of this rule.

* * *

- (c) Relevant Factors--Future Appearance.** In determining which conditions of release will reasonably assure the accused’s appearance, the court shall, on the available information, consider the relevant facts including but not limited to:

because that determination had already occurred the day before in District Court (the defense took “no position” on this issue) and the judge found probable cause existed. ARP 003. Also, corroboration of a victim’s allegations of sexual assault is never required. *See*: RCW 9A.44.020(1):

In order to convict the person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.

- (1) The accused's history of response to legal process, particularly court orders to personally appear;
- (2) The accused's employment status and history, enrollment in an educational institution or training program, participation in a counseling or treatment program, performance of volunteer work in the community, participation in school or cultural activities or receipt of financial assistance from the government;
- (3) The accused's family ties and relationships;
- (4) The accused's reputation, character and mental condition;
- (5) The length of the accused's residence in the community;
- (6) The accused's criminal record;
- (7) The willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with conditions of release;
- (8) The nature of the charge, if relevant to the risk of nonappearance;
- (9) Any other factors indicating the accused's ties to the community.

CrR 3.2(a) and (c).

Nothing at all in this so-called "new information" provided by the State in any way addresses those factors relevant to release under CrR 3.2. Importantly, the fact that the assigned case detective had no objection to Petitioner's release conclusively established that concerns about Petitioner being a danger to the community, or might commit a violent crime or intimidate witnesses (*see* CrR 3.2(a), (c) and (e)), did not exist. *See* ARP 012 (law enforcement had no objection to the suspect's release).

Moreover, the DPA's statement in her *ex parte* request to increase bail (ARP 017) that the District Court was unaware at the First Appearance

of corroborating statements from the victim's friends that she was impaired by alcohol earlier in the day was misleading and false. The Statement of Probable Cause reviewed by the District Court Judge at the First Appearance (ARP 012) made it very clear that the complainant's friends were with her and Petitioner the entire day, including when they all were drinking earlier in the afternoon, as well as witnessing drinking at the complainant's friend's house in a parked RV at the time of the alleged incident. From this, the District Court Judge could readily infer that the "friends" of the complainant would be available prosecution witnesses at trial, although this "new information" was irrelevant to bail considerations.

The DPA did not provide the Superior Court judge with the audio recording or a transcript of the District Court bail hearing; she did not inform the Superior Court judge that Petitioner voluntarily surrendered; that the PR court screener recommended PR; that the investigating detective had no objection to his release from custody; that Petitioner's father was present and spoke on his behalf at the bail hearing; nor any of the other points presented by the defense at the District Court bail hearing.⁷

⁷ This failure by the DPA violated the enhanced requirement of Candor to the Tribunal required by RPC 3.3(f), relating to *ex parte* communications, which is discussed in Section L, *infra*.

The Superior Court judge granted the prosecutor's *ex parte* request for an arrest warrant and a \$50,000 bail increase. ARP 023-025, 26.⁸

The Petitioner's Superior Court arraignment, which under King County procedure would have been the first time he would have been able to challenge the increased bond, absent a motion to shorten time, which would have still taken several days to set, was scheduled for May 3, 2018, almost two weeks later. ARP 033; Second Allen Dec'l at 043. Rather than risk the investigating detective arresting the defendant prior to the arraignment on the arrest warrant, the defense posted bail in the amount of \$50,000, which required Petitioner's father to pay a \$4,000 premium to the bonding company and post property as collateral.⁹

The Petitioner's criminal case proceeded through discovery and defense interviews of prosecution witnesses. The Petitioner appeared at all scheduled hearings and there were no violations of the conditions of release. On January 11, 2019, the prosecution dismissed the case outright, writing in its dismissal motion that:

⁸ The April 19, 2018 orders raising bail to \$50,000 and issuing an arrest warrant were signed by a Superior Court Judge at 2:26 PM. The parties and court were not made aware of this that afternoon at the 2:30 P.M. second appearance on the District Court Calendar, and because of this oversight the Petitioner was not immediately re-arrested on the warrant, which would normally have occurred.

⁹ As shown in the second Allen Dec'l, ARP 038, 044, 065, the Muth Dec'l, ARP 068; the Goldsmith Dec'l, ARP 071; and, the Gause Dec'l, ARP 074, many defendants are arrested pursuant to this procedure, prior to their arraignment, some at gun point, without the means to challenge the increase, and without even notice after their bail was raised *ex parte*.

This case should be dismissed for the following reasons: In the interests of justice **and based upon information not available at the time of filing.** (Emphasis added.)

ARP 036-037.¹⁰

C. **There Exist No Plain, Speedy or Adequate Remedies at Law to Address this Issue Other than By a Writ of Prohibition or Mandamus**

1. **The Criminal Bar Has Objected to This Procedure for Almost a Quarter of a Century and Has Unsuccessfully Tried to Reform the Procedure**

Private attorneys and public defenders in King County have been objecting to this procedure for at least a quarter of a century. Attached to the Second Allen Dec'l are some of the many letters he sent on behalf of the Washington Association of Criminal Defense Lawyers starting in 1996, 24 years ago, to the then-presiding judges and the KCPAO objecting to this procedure. Follow-up letters were sent in 1997, 1999, 2005, 2015, 2016 and many meetings took place which were attended by King County Criminal Presiding Judges and senior staff from the KCPAO. Allen Dec'l, ARP 038, 044-046.¹¹ The Defense Bar put a great deal of time and effort

¹⁰ The defense witness interviews of the complainant and her friends established that, while she had been drinking, she was not physically helpless or mentally incapacitated and that the sexual contact was consensual. *See* Second Allen Decl., ARP 038, 046-047.

¹¹ While many of these letters are attached, through an oversight an additional letter, which is mentioned in the Second Allen Declaration at ARP 045-046 was inadvertently not attached to the ARP. This was a letter dated June 13, 2005 to then-Presiding Judge Ronald Kessler as well as the King County Prosecuting Attorney's Office, complaining of these procedures, and referencing a then recent meeting where these issues were discussed with judges and senior prosecutors. ARP 45.

into attempting to negotiate a change in this procedure. Nothing ever came of this and the procedure has continued, although there were many meetings with King County judges and supervisory prosecutors at the KCPAO over almost 25 years, in addition to the ones mentioned *supra*, in a futile effort to change this procedure. This procedure is ongoing and continues to occur on a regular basis. *See* Second Allen Dec'l, ARP 038; Gause Dec'l (First Supp.) at ARP 074; Goldsmith Dec'l, ARP 071.

2. **Even Though Petitioner's Bail Issue is Now Moot, it Continues to Recur and is a Matter of Public Importance and this Court Should Grant Relief**

Because bail issues quickly become moot, there is no other adequate remedy to address this recurring issue other than through a Writ of Prohibition/Mandamus pursuant to Art. 4, Sec. 4 of the Washington State Constitution.

This Court has long recognized that appellate courts should consider moot matters when they address issues that are continuing, of substantial public importance and otherwise will evade review. This is especially the case in bail matters, where there is no mechanism for an appeal regarding bail once a case is completed because bail issues quickly become moot when a case is resolved by a dismissal, as here, or an acquittal or conviction. Criminal defendants whose bail has been raised *ex parte* would have to first challenge the bail increase at arraignment in order to perfect their appeal.

However, once their bail has been reviewed at the arraignment, the issue effectively becomes moot in that particular case. Moreover, Defendants with private attorneys would not typically be able to fund an appeal challenging this *ex parte* procedure, once their bail has been reviewed at arraignment, especially due to legal fees and the necessity to focus on their pending criminal case.¹²

This Court has reviewed moot issues where they present issues of broad public importance that are like to recur. For example, in *State v. Hunley*, 175 Wn.2d 901 (2012), this Court reviewed a moot issue involving a sentencing statute which shifted a burden to the defendant and therefore violated due process. While this Court explained that it typically did not consider questions that were moot, which that case was because of the expiration of the defendant's sentencing term, "we may retain and decide an appeal if it involves matters of continuing and substantial public interest." *Id.* at 907. This Court wrote that there were three factors to be considered:

'[(1)] the public or private nature of the question presented, [(2)] the desirability of an authoritative determination for the future guidance of public officers, and [(3)] the likelihood of future recurrence of the question.' "

¹² Petitioner's attorneys are representing him in this matter *pro bono*. Second Allen Dec'l, ARP 038.

Id. at 906 (quoting from *State v. Gentry*, 125 Wn.2d 570, 616 (1995)). These factors all mandate review in the instant matter.

Recently, this Court considered a moot controversy in *Riddle v. Elofson*, 193 Wn.2d 423 (2019), where the Yakima County Clerk sought a writ of prohibition against the Yakima Superior Court Judges as to their efforts to require her to procure an additional bond as a condition of maintaining her elected office. Although *Riddle* lost her bid for re-election and was no longer the Yakima County Clerk at the time of this Court’s decision, this Court nevertheless reached the merits and considered it “as a live controversy.” *Id.* at 442, Yu, dissent, n.2.

The King County *ex parte* bail procedure raised in this writ implicates all of the *State v. Hunley, supra*, factors: it is clearly a matter of a public nature; there must be a determination for the future guidance of judges and prosecutors; the procedure has been in place for decades and is recurring; and, it is therefore an issue involving matters “of continuing and substantial public interest.” *Hunley, supra* at 907.

3. **Pretrial Incarceration Has a Huge Impact on a Person’s Life, Family and Oftentimes Leads to Harsher Sentencing**

In the instant case, Petitioner was fortunate to have a parent who had the economic means to purchase a bail bond. In this situation, the effect of this unconstitutional procedure is still substantial, although strictly

economic. However, where a defendant does not have the means to post an increased bond, research demonstrates that even short periods of incarceration have a very substantial effect on a person's employment, housing, child custody and access to healthcare.¹³ A person already experiencing homelessness may lose shelter space, personal belongings stored there and a place on a wait list to enter permanent housing.¹⁴ Recent studies demonstrate a causal link between pretrial incarceration and adverse case outcomes.¹⁵ According to an article written by King County Superior Court Judge Theresa Doyle:

[j]udges have discussed concerns about the unconscious influence that a defendant's custody status has on their sentencing decisions. With an out-of-custody defendant, the judge had to make an affirmative decision to send the person to prison or jail rather than imposing an alternative. An in-custody defendant is already there."¹⁶

A recent article in The Intercept, *New Orleans Prosecutors Routinely Violate Defendants' Right to Counsel to Keep Them in Jail*, May

¹³ Lisa Foster, *Judicial Responsibility for Justice in Criminal Courts*, 46 HOFSTRA L. REV. 21 (Fall 2017)

¹⁴ ACLU, *No Money, No Freedom: The Need for Bail Reform* (2016), <http://www.aclu-wa.org/bail>.

¹⁵ *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 Harv. L. Rev. 1125, 1128 (2018); see also Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequence of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 714 (2017); see also John D. Parron, *Pleading for Freedom: The Threat of Guilty Pleas Induced by the Revocation of Bail*, 20 UPAJCL 137; see also Samuel Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YLJ 1344 (2014).

¹⁶ Theresa Doyle, King County Bar Bulletin, *Fixing the Money Bail System*, 1 (April 2016), <https://www.courts.wa.gov/subsite/mjc/docs/FixingtheMoneyBailSystem.pdf>.

15, 2019, details the pre-trial bail procedure in New Orleans, which is very similar to that in King County.¹⁷ In New Orleans, a defendant held on suspicion of a felony is first brought before a magistrate judge to have his initial bail set. In one particular case, the bond was set at \$500,000, which would require a ten percent premium of \$50,000. However, without notifying the defendant or his lawyers, the prosecutors took the indictment to a higher judge, requesting and obtaining an increase to \$1.5 million dollars, which the defendant could not raise. This is effectively the same procedure that exists in King County.

The article reports that in 151 cases studied, the average bail set by a magistrate, where the defense was present, was \$165,103. However, after the prosecutor returned an indictment to the criminal district judge, who only heard arguments from the state, the bail amount increased by an average of \$952,368. Even where defense attorneys later took the issue back before the court to challenge the bail increase, the reduction was only an average of \$64,037, for a final bail amount of just over one million dollars, much larger than the original bond. *Id* at 5.

Relevant to the *Pimentel* case, this article provides what has been described as a “perfect example” of why the procedure allowing a judge to

¹⁷ <https://interc.pt/2E9rzSs>.

ex parte raise bond after an initial hearing before a magistrate judge is so unfair:

A magistrate was able to hear this testimony and these arguments and make a decision on bail based on firsthand knowledge of the evidence. But this system then allowed the district attorney to do an end run around the defense, taking the case to “a secret proceeding” that allowed them to “present whatever version of the facts they want,” secure a “quick indictment,” and run back to a district judge to inflate the bond “so high that [the client] will never get out of jail,” [his attorney stated].

Id. at 9.

4. A Writ is the Only Effective Means to Address this Issue

Article 4, § 4 “Jurisdiction” of the Washington State Constitution, provides in its relevant portion that:

The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction.

Because Petitioner is requesting that the KCPAO and the Judges of the Superior Court “desist or refrain from further proceedings” as to its *ex parte* bail practice, a writ of prohibition, or alternatively, a writ of mandamus, is the appropriate mechanism.¹⁸

¹⁸ *East Valley School Dist. No. 90 v. Taylor*, 174 Wn.App. 52 (2013) explained that the

5. **The Phrase in Art. 4 § 4 that this Court May Issue Writs of Prohibition “Necessary and Proper to the Complete Exercise of its Appellate and Revisory Jurisdiction” Confers Additional Power and Does Not Limit this Court’s Jurisdiction**

Article 4, Sec. 4 of the Washington Constitution provides that this court can issue writs of prohibition “necessary and proper to the complete exercise of its appellate and revisory jurisdiction.” *Id.* In *State ex rel. Amsterdamsch v. Superior Court of Spokane County*, 15 Wash. 669 (1896),¹⁹ this Court held that this phrase did not limit its authority to issue a writ of prohibition, but instead gave it “additional power,”

But it is claimed on behalf of the respondent that the supreme court can issue such writs only when necessary to the exercise of its appellate jurisdiction. This contention of the respondent seems to be based upon the assumption that the very language of the constitution, “all other writs,” etc., clearly shows an intention to limit the power granted to this court in the preceding portion of the sentence—to issue writs of prohibition—to cases where such writs are necessary to the exercise of its appellate power. **If that be true, the power granted to this court in that regard is of little or no practical value, for it is difficult to conceive a case in which it would be necessary to issue the writ solely for that purpose. Indeed, it has been held, and not without reason, that the granting a writ of prohibition is not the exercise of appellate jurisdiction, nor in aid of such jurisdiction. Mayor, etc., of *Memphis v. Halsey*, 12 Heisk. 210; High, Extr. Rem. (2d Ed.) § 785a. But we do not think that the words referred to were intended to restrict or limit the power to issue the writs specifically**

Court of Appeals did not have jurisdiction to issue an original writ, such as the writ of prohibition requested here, but instead jurisdiction was reserved to this Court.

¹⁹ This case has occasionally been cited in appellate opinions as “*State ex rel. v. Superior Court.*”

mentioned, but rather to confer upon the supreme court the additional power to issue all other writs, whatever they may be, which may be necessary to the complete exercise of its appellate and revisory jurisdiction. (Emphasis added).

Id. at 672-73.

This Court wrote that it had the power to issue a writ of prohibition, which was not related to its “appellate or revisory jurisdiction:”

Entertaining the same views as to the jurisdiction and power of this court with reference to the remedy of prohibition that are held by the supreme court of California, **we have in numerous instances issued the writ where the object sought to be attained was the prevention of unauthorized acts on the part of the superior courts, and the practice of this court in that regard must now be deemed settled.** (Emphasis added.)

Id. at 674.²⁰

Citing *State ex rel. Amsterdamsch v. Superior Court, id.*, this Court again repeated in *State ex rel. Murphy v. Taylor*, 101 Wash. 148 (1918) that its authority to issue a writ of prohibition was not limited to “appellate and revisory” jurisdiction:

. . . we early held that such was not its meaning. In *State ex rel. v. Superior Court*, 15 Wash. 668, 47 Pac. 31, 37 L. R. A. 111, 55 Am. St. Rep. 907, the writ was sought to prohibit a superior court from proceeding in a matter thought to be without and in excess of its jurisdiction, and it was contended that the court was without power to issue the writ because of the reason here suggested. The court held, however, that the qualifying clause was not intended to

²⁰ Washington’s Art. 4, § 4 was “substantially copied” from California’s Constitution. *Id.* at 673.

restrict or limit its power to issue the writs specifically enumerated, but was intended rather to confer on the court power to issue writs other than those specifically enumerated which might be found necessary to a complete exercise of its appellate and revisory jurisdiction. In the course of the opinion it was pointed out that to restrict the power as therein sought would leave the power of no practical value, as it is ‘difficult to conceive a case in which it would be necessary to issue the writ solely’ in aid of a court's appellate or revisory jurisdiction. **Subject to the restriction that writs of this sort will only be issued to restrain the exercise of an unauthorized judicial or quasi judicial act** (*State ex rel. Bennett v. Taylor*, 54 Wash. 150, 102 Pac. 1029), the case has not been departed from, but, on the contrary, announces the principle upon which this court has issued the writ in the numerous instances found in our records where no question of aiding its appellate or revisory jurisdiction was involved. (Emphasis added.)

Id. at 150-51.

Just as this Court concluded 125 years ago, this issue “must now be deemed settled.” *State ex rel. Amsterdamsch, supra* at 674.

D. Where the Elected Prosecutor and Superior Court Bench Have Engaged in an Unconstitutional Procedure Obtaining *Ex Parte* Bail Increases, They are Acting Either Without Jurisdiction or Beyond Their Jurisdiction

Where, as here, an elected prosecutor, his deputies and the Superior Court bench engaged in the long standing *ex parte* bail procedure which is unconstitutional and also violate ethics rules, they are acting either beyond their jurisdiction, or conversely, without jurisdiction, such that a writ of

prohibition is available to enjoin their actions. *State ex rel. Murphy v. Taylor, id.*

E. This Court Has Many Times Accepted Review in Matters in Order to Declare the Rights of Parties Where a Matter of Great Public Interest and Has Been Adequately Briefed

This Court has held many times that where a matter is of public interest and has been adequately briefed, that it would exercise its discretion and declare the rights of the parties:

Where the question is one of great public interest and has been brought to the court's attention in the action where it is adequately briefed and argued, and where it appears that an opinion of the court would be beneficial to the public and to the other branches of the government, **the court may exercise its discretion and render a declaratory judgment to resolve a question of constitutional interpretation.**

Lee v. State, 185 Wn.2d 608, 618 (2016) (emphasis added).

Even where an original action was designated a Writ of Mandamus, this court has nevertheless reviewed it as if it were a request for declaratory judgment where there was an issue of public interest that needed to be resolved:

It is true that the question does not come before us in the form of a request for a declaratory judgment. However, the relief sought is in essence the same, and we regard it in the public interest to disregard the form of the action and to render our interpretation.

State ex rel. Distilled Spirits Inst., Inc. v. Kinnear, 80 Wn.2d 175, 178-79 (1972).

F. If This Court Believes That the Requisites for a Writ of Prohibition are Not Met, Then it Should Exercise its Discretion and Consider it as a Petition for a Writ Of Mandamus

1. This Court Has Often Considered Alternative Writs Not Pled by Petitioners in Order to Grant Relief

This Court has reviewed writ petitions even where it has determined that the requisites for a specific writ were not met but still considered it as an alternative writ or request for declaratory judgment. *State ex rel. Distilled Spirits v. Kinnear, id; Lee v. State, supra*.

For example in *State v. Superior Court of Grays Harbor Co.*, 29 Wn.2d 725 (1948), the petitioner filed a Writ of Prohibition challenging a denial of a change of venue. This Court held that the proper vehicle to accomplish this was a Writ of Certiorari, but nevertheless reviewed it as such and granted relief. *Id.* at 732.

Consistent with this principle, in *Freeman v. Gregoire*, 171 Wn.2d 316, 323 (2011), this Court explained:

This court has original jurisdiction over writs of quo warranto or **mandamus**, but only appellate and revisory jurisdiction over writs of prohibition. Wash. Const. art. IV, § 4. **Nonetheless, we can issue a writ to prohibit a state officer from exercising a mandatory duty.** *Wash. State Labor*

Council v. Reed, 149 Wash.2d 48, 55–56, 65 P.3d 1203 (2003). **The only relief requested by petitioners in their petition against state officer was a writ of prohibition. Pet. Against State Officer at 1–2. In later briefings, petitioners expanded this remedy to include a writ of mandamus. Accordingly, we treat petitioners’ action as one for mandamus.** (Emphasis added).

Id.

2. A Writ of Mandamus May Prohibit an Act

A Writ of Mandamus may be employed to prohibit the doing of an act as well as compelling it. *State ex rel. O’Connell v. Yelle*, 51 Wn.2d 620, 629 (1958); *Freeman v. Gregoire*, *supra*.

Mandamus is available to compel Judges, as well as prosecutors, to comply with constitutional requirements in criminal cases. In *Seattle Times v. Ishikawa*, 97 Wn.2d 30 (1982) a newspaper brought an original mandamus action against a superior court judge, challenging his closure orders in a criminal proceeding. This Court held that an original mandamus action was the proper forum for third parties to challenge a criminal trial closure order, where both federal and state constitutional grounds justify the newspapers’ right of access to pretrial hearings.

Similarly, in *Seattle Times v. Serko*, 170 Wn.2d 581 (2010), this Court held that mandamus was the appropriate vehicle for the news media to access documents which were improperly withheld from production under the Public Records Act. In so ruling, this Court held that other remedies, such a

declaratory judgment action or an attempt to intervene in the criminal proceeding were not adequate remedies.²¹

Therefore, if this Court were to determine that a Writ of Prohibition was not the proper writ to raise the constitutional issues presented, it should nevertheless review it as a Writ of Mandamus, requiring that the Judges and the KCPAO shall conduct bail hearings only after giving notice and an opportunity for the accused to appear with counsel following a contested District Court first appearance hearing. *Ishikawa, supra*.

G. There is No Adequate Remedy at Law Available to Challenge This Longstanding Unconstitutional Practice Other Than by a Writ

Kreidler v. Eikenberry, 111 Wn.2d 828, 838 (1989), holds that a petitioner seeking a writ must demonstrate that there is “the absence of a plain, speedy, and adequate remedy in the course of legal proceedings.” *Riddle, supra*, explains that a petitioner is not required to show a complete absence of a remedy, but only that there is no “adequate” remedy:

The complete absence of any “other remedy” is not strictly required. . . . The operative word of the second prong is the “adequacy” of the remedy available. (Internal citations omitted.)

²¹ This Court has also exercised its original jurisdiction on a Writ of Mandamus where the constitutionality of a statute was at issue. *Dept. of Ecology v. State Finance Committee*, 116 Wn.2d 246, 251-252 (1991); *Brown v. Owen*, 165 Wn.2d 706, 718 (2009) (mandamus is appropriate to challenge constitutionality of a statute).

Riddle v. Elofson, supra, 193 Wn.2d at 434. Moreover, if there is an available remedy, it must also be plain and speedy. *Kreidler, supra* at 838.

Bail issues quickly become moot. There were no adequate grounds at law to challenge the *ex parte* bail matter in *Pimentel* once bail was posted or the case was dismissed. The “normal appellate process” does not provide an effective remedy. *See* RAP 2.2. The granting of an interlocutory appeal is discretionary as well as disfavored. *Minehart v. Morning Star Boys Ranch*, 156 Wn.App. 457, 462 (2010). While in some cases appellate courts have agreed to review moot bail issues, these are the exceptions, not the rule, and are discretionary. Especially in a case such as *Pimentel* where it was dismissed, so there was no appealable order, and the disputed bond had been posted and the defendant released on bail, one cannot say with any confidence that the COA would have exercised its discretion and reviewed this matter interlocutorily. An interlocutory appeal cannot be considered “a plain, speedy, and adequate” remedy at law.

A declaratory judgment action filed in the Superior Court would likewise not have been an adequate remedy. While a declaratory judgment action may determine “rights and status under written instruments, statutes, ordinances,” RCW 7.24.020, it is not available to litigate matters that are technically moot, although recurring. *See, e.g., Hill v. Dept. of Transp.*, 76 Wn.App. 631 (1995) (where seaman claimed that the State failed to provide

him with a safe workplace in a seaworthy vessel, which denied him the right to fair working conditions, his action was moot because he was no longer employed, and declaratory judgment was not available).²²

H. The Respondent Judges and the Elected King County Prosecuting Attorney are State Officers

A Writ of Prohibition or Mandamus is only cognizable against a State officer. *Washington State Labor Counsel v. Reed*, 149 Wn.2d 48, 54 (2003). A Superior Court Judge is a State officer, even though the judge is elected by county voters. *Parker v. Wyman*, 176 Wn.2d 212 (2012). The same is true of the elected prosecuting attorney.

RCW 36.17.020, “Schedule of Salaries,” provides that the State shall pay approximately ½ of a county’s Prosecuting Attorney’s salary.²³ Under the official notes following this statute, the legislature wrote that elected county prosecuting attorneys functions “as a state officer” in pursuing criminal cases. The official notes from the 2008 legislative session state:

Findings--2008 c 309: “The legislature finds that an elected county prosecuting attorney functions as both a state officer in pursuing criminal cases on behalf of the state of Washington, and as a county officer who acts as civil counsel for the county, and provides services to school

²² Even if a Superior Court judge ruled in favor of Petitioner on a declaratory judgment action challenging the *ex parte* bail procedure, the KCPAO and Judges might choose to not appeal the case to an appellate court, resulting in a trial court decision with no precedential value.

²³ The actual amount the State pays of the PA’s salary is ½ of what it pays for a superior court judge’s salary.

districts and lesser taxing districts by statute. (Emphasis added).

2008 c 309 § 1.

This establishes that a PA is a state officer when prosecuting criminal felony cases, as here.

In *Whatcom County v. State*, 99 Wn.App. 237 (2000), *rev. den.*, 141 Wn.2d 1001 (2000), Whatcom County brought a declaratory judgment action against the Attorney General (AG) to determine whether the county prosecuting attorney (PA), as well as his deputy (DPA), were state officers, which would entitle them to a defense by the AG and indemnification in a civil rights lawsuit brought by the estate of a homicide victim.²⁴ The “State’s central argument” in *Whatcom County* was that county prosecutors represent the county and therefore the prosecutor “cannot be a ‘state officer.’” *Id.* at 242-43.

The COA held that the PA and his DPA were “state officers,” writing that it was significant that one half of an elected prosecuting attorney’s salary was paid for by the state pursuant to RCW 36.17.020 and that prosecuting attorneys “appear for and represent the state and the counties in court,” “subject to the supervisory control and direction of the attorney general.” *Id.*

²⁴ In the underlying civil case, the estate alleged that the DPA acted negligently and in violation of the victim’s civil rights for giving erroneous advice to a jail officer that a felony DV defendant could be released from jail, who then murdered his former girlfriend.

at 247-48. If the AG determines that criminal laws are not properly enforced in a county due to failure or neglect by the PA, the AG can take over the prosecution pursuant to RCW 43.10.090. Finally, the elected county PA can be removed from office by the state legislature. *Id.* at 248.

I. Modifying Bail After an Initial Appearance is a Critical Stage which Requires Notice to the Defense and an Opportunity to Appear and Object and the *Ex Parte* Procedure is Unconstitutional

The bail procedure in King County relating to individuals, like Petitioner, who are initially arrested (or who surrender under the threat of arrest) on the basis of probable cause in a felony matter, and who have had their bail set in cases in District Court, but which is later increased *ex parte* by the Superior Court, without notice or hearing, violates the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 14, 20 and 22 of the Washington State Constitution, court rules and ethics rules for lawyers and judges.

The KCPAO and the Superior Court Judges have had a procedure in place for decades whereby individuals arrested on probable cause for a felony, or, like the Petitioner, who voluntarily surrender, have their first appearance before a King County District Court judge where bail is set and probable cause determined in a contested proceeding. Following the first appearance, the District Court will set a second appearance within 72 hours of the first appearance, in order to give the State an opportunity to file

charges. If charges are not filed by the second appearance, the District Court matter is dismissed.²⁵ The State then has the opportunity to file its case at some later time in Superior Court within the applicable statute of limitations without the speedy trial clock running. If charges are filed before the time of the second appearance, the defendant will be ordered to appear in Superior Court for an arraignment, which is typically set 10-14 days out.²⁶

In many cases in King County when a defendant is released either on personal recognizance or on a bail lower than requested by the State, the State will proceed *ex parte*, as it did in the instant case. In the great majority of cases, as here, Superior Court judges routinely raise bail when requested by the State at this stage, even when State does not allege a violation of conditions of release. See CrR 3.2(k)(1); Second Allen Dec'l, ARP 038.²⁷

As in the instant case, arraignment is usually set out ten days to two weeks after an information is filed in superior court which would be the first time a challenge to the increased bail would be heard. There is no established procedure available in King County Superior Court whereby a

²⁵ The defendant is then released from custody if he or she did not previously get a PR release or could not post bond. The dismissal stops the running of the speedy trial clock.

²⁶ See Second Allen Dec'l, ARP 038, 042; Gause Dec'l, ARP 074, 075.

²⁷ In fact, even when the prosecutor does not request an increase in bail, King County Superior Court Judges have *sua sponte* raised bond set in District Court. Goldsmith Dec'l, ARP 071-073.

defendant can have an expedited hearing in order to attempt to convince a Superior Court judge to not raise bail, but instead the defense would have to wait until the arraignment or note a motion with seven days' notice. Even if the defense requested that time be shortened, it would still take several days and a great deal of effort to schedule an expedited hearing. *See*: Second Allen Dec'l, ARP 038, 043.

Moreover, if the defendant does not immediately post the increased bond, as was done here, the defendant risks being arrested on the warrant by the investigative detective, as often occurs in these matters. *See* Second Allen Dec'l, ARP 038, 043-044; Goldsmith Dec'l, ARP 071; Muth Dec'l, ARP 068.

This procedure, which most often results in increased bails, has a very deleterious effect on defendants. Once the bail is increased *ex parte*, it is typically the benchmark by which a judge at a later contested hearing considers bail. *See* Muth Dec'l, ARP 068. As shown herein at § C(3), *supra*, this often results in a higher bail than was set at the initial contested bail hearing.

Additionally, as shown in the Allen, Muth, Gause and Goldsmith Declarations, individuals often post bail and are released after the District Court calendar but are again incarcerated within days once the bond is increased *ex parte* in the Superior Court. Besides the yo-yo emotional effect

of being incarcerated-released-incarcerated, it also results in the individuals losing the substantial premium they had already paid to the bonding company, which is typically 8% to 10% of the bail amount. In such a situation, the defendants and their families are also punished financially. See Muth Declaration, ARP 068.

J. A Defendant Has a Constitutional Right to Be Present and Represented at Every Critical Stage of a Criminal Prosecution

A person has the right to appear with counsel at any critical stage of a prosecution:

A criminal defendant has a right, under the due process clause of the Fourteenth Amendment, to be present “at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.” *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987); *In re Pers. Restraint of Lord*, 123 Wash.2d 296, 306, 868 P.2d 835 (1994) (*Lord II*). Article I, section 22 of Washington’s Constitution also guarantees the right to “appear and defend in person.”

State v. Schierman, 192 Wn.2d 577, 600-01 (2018).

The United States Supreme Court explained that “what makes a stage critical is what shows the need for counsel’s presence.” *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 212 (2008). *Rothgery* holds that a lawyer’s advocacy at a bail hearing fits within the Court’s critical-stage analysis.

In *Rothgery, id.*, a former state court criminal defendant whose criminal case was eventually dismissed, sued the county under a 42 U.S.C. § 1983 federal civil rights action alleging violation of the Sixth and Fourteenth Amendments for denying him appointed counsel at his bond hearings after he had been arrested on probable cause for committing the crime of being a felon in possession of a firearm. After his arrest, he was “promptly” brought before a magistrate, as required by Texas law, for an Article 15.17 hearing, which combined a probable cause determination “with the setting of bail,” although without being appointed a lawyer. 554 U.S. at 194.

In total similarity to the instant case, “the arresting officer submitted a sworn “Affidavit of Probable Cause.” *Id.* at 196. The magistrate, without appointing him a lawyer, determined that probable cause existed for the arrest and set bail at \$5,000, which the defendant posted and was released from custody. Later he was indicted by a grand jury for this charge and his bail was increased to \$15,000, which resulted in his re-arrest. It was not until six months after the Article 15.17 hearing that he was finally assigned a lawyer, who obtained a bail reduction and demonstrated to the prosecutor that he had never been convicted of a felony, which resulted in the indictment being dismissed.

Following dismissal of criminal charges, Rothgery brought the civil action, complaining that the refusal to appoint an attorney at his first appearance, the Article 15.17 hearing, was a civil rights violation. The defendant county argued that the Sixth Amendment right to counsel did not attach at the Article 15.17 hearing because “the relevant prosecutors were not aware of or involved” in his arrest or appearance before the magistrate and the officer who arrested and filed the probable cause affidavit had no power to commit the state to prosecute him. *Id.* at 197-198.

The *Rothgery* Court rejected this argument and explained that:

We have, for purpose of the right to counsel, pegged commencement to “the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment”

The *Rothgery* Court wrote that it had twice previously held that the right to counsel attached at the initial appearance before a judicial officer even though formal charges had not been filed:

. . . we have twice held that the right to counsel attaches at the initial appearance before a judicial officer, see *Jackson*, 475 U.S., at 629, n. 3, 106 S.Ct. 1404; *Brewer*, 430 U.S., at 399, 97 S.Ct. 1232. This first time before a court, also known as the “ ‘preliminary arraignment’ ” or “ ‘arraignment on the complaint,’ ” see 1 W. LaFare, J. Israel, N. King, & O. Kerr, *Criminal Procedure* § 1.4(g), p. 135 (3d ed. 2007), is generally the hearing at which “the magistrate informs the defendant of the charge in the complaint, and of various rights in further proceedings,” and “determine[s] the conditions for pretrial release,” *ibid.* Texas’s article 15.17

hearing is an initial appearance: Rothgery was taken before a magistrate, informed of the formal accusation against him, and sent to jail until he posted bail. See *supra*, at 2581 – 2582. *Brewer* and *Jackson* control.

Id. at 199.

Lest there be any question that the First Appearance before a District Court Judge, prior to formal charges being filed, constituted a critical stage at which time appointment of counsel attaches, Justice Thomas' dissent makes it clear that this is the case:

The Court holds today—for the first time after plenary consideration of the question—that a criminal prosecution begins, and that the Sixth Amendment right to counsel therefore attaches, when an individual who has been placed under arrest makes an initial appearance before a magistrate for a probable-cause determination and the setting of bail. Because the Court's holding is not supported by the original meaning of the Sixth Amendment or any reasonable interpretation of our precedents, I respectfully dissent.

Rothgery v. Gillespie Cty., 554 U.S. 191, 218 (2008) (Thomas, J., dissent) (emphasis added).²⁸

Rothgery also recognized that *Coleman v. Alabama*, 399 U.S. 1 (1970) established the right to counsel attached at preliminary hearings, prior to charges being filed, 50 years ago:

. . . by the time a defendant is brought before a judicial officer, is informed of a formally lodged accusation, and has

²⁸ While Justice Thomas was mistaken in his conclusion that this was the first time the Court so ruled, nevertheless this quote clearly frames the issue decided by the *Rothgery* majority opinion. See: *Id.* at 199.

restrictions imposed on his liberty in aid of the prosecution, the State's relationship with the defendant has become solidly adversarial. And that is just as true when the proceeding comes before the indictment (in the case of the initial arraignment on a formal complaint) as when it comes after it (at an arraignment on an indictment). *See Coleman v. Alabama*, 399 U.S. 1, 8, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) (plurality opinion) (right to counsel applies at preindictment preliminary hearing at which the “sole purposes ... are to determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury, and, if so, to fix bail if the offense is bailable”).

Rothgery, supra, at 202-203.

With the Supreme Court precedents holding that a preliminary appearance constituted the time at which the right to counsel attaches, the Respondents herein have no valid argument that the right to be present with counsel at a hearing on a bond increase somehow disappears or gets put on hold when Respondent KCPAO requests an *ex parte* increase in bond in Superior Court. This proceeding, where the State seeks a bond increase, is clearly a critical stage that requires notice, the right to counsel and a contested hearing. The same is true where a Superior Court judge *sua sponte* decides to increase bail.

As typically occurs with *ex parte* hearings, the State presents incomplete and inaccurate information at the closed *ex parte* proceeding in violation of RPC 3.3(f). By conducting these hearings *ex parte*, the King County Superior Court effectively deprives defendants of the opportunity

to present relevant information or contest facts and arguments raised by the State.

The District Court's First Appearance calendar is a critical stage and counsel is required. That being the case, by parity of reasoning, the KCPAO's request to increase the District Court's bond ruling in Superior Court must also be held to be a critical stage and the current no notice, *ex parte* proceeding, is unconstitutional under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 14, 20 and 22 of the Washington State Constitution.

K. The Prosecutor's and Superior Court Judges' Actions Violated Ethical Prohibitions as to *Ex Parte* Contacts

RPC 3.5 states in its relevant portion that an attorney shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order.

A similar rule pertaining to judges is Rule 2.9 of the Code of Judicial Conduct (CJC), which provides in its relevant portion that:

A) A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, before that judge's court except as follows:

- (1) When circumstances require it, *ex parte* communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, or *ex parte*

communication pursuant to a written policy or rule for a mental health court, drug court, or other therapeutic court, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte* communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication, and gives the parties an opportunity to respond.

The matter of the bail increase in the case of *State of Washington v. Julian Pimentel* in both District Court and Superior Court was a “pending or impending matter,” as those terms are used in CJC Rule 2.9. The exceptions to this rule contained in CJC Rule 2.9(A)(1)(a) and (b) did not apply, because this did not take place in the context of a mental health, drug or therapeutic court. Nor was it the type of communication which a judge could possibly believe would not give a tactical advantage to the State as a result of the *ex parte* communication. Likewise, the judge did not notify and “give [the defense] an opportunity to respond.”²⁹

While CJC Rule 2.9(A)(5) provides that a judge may consider an *ex parte* communication when expressly authorized by law, there is no such authorization where the State merely wants the Superior Court to reconsider the prior ruling of the District Court Judge at the prior contested bail hearing

²⁹ On occasion, judges have *sua sponte* increased bail set by the District Court, even when not requested by the KCPAO. *See*: Goldsmith Dec’1, ARP 071.

where violations of conditions of release were not alleged. It is not a situation where the State alleged that conditions of release were violated and public safety was at risk, in which case an *ex parte* arrest warrant could be issued, followed by “an immediate hearing” to reconsider conditions of release. *See*: CrR 3.2(1)(1). Instead, it was simply the KCPAO trying to gain an advantage by violating the Federal and State constitutions and court rules prohibiting *ex parte* proceedings.

L. The Prosecutor’s Conduct Violated the Ethical Requirement of Candor to the Tribunal

As often happens in *ex parte* bail matters, the State either misstates the facts or does not provide all the relevant and material facts. Both those problems occurred here. *See* herein § B(2), *supra*.

The duty of candor required by RPC 3.3 is heightened where, as here, there is an *ex parte* proceeding:

f) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

CrR 3.3(f) (emphasis added).

In the instant case, the DPA failed to comply with her enhanced ethical duty of candor to the tribunal. *See*: *In re Carmick*, 146 Wn.2d 582, 594 (2002) (in an *ex parte* proceeding, a court views “misrepresentations to the court with particular disfavor,” and “will not tolerate any deviation from

the strictest adherence to this duty.”); *In re Ferguson*, 170 Wn.2d 916 (2011).

II. CONCLUSION

The *ex parte* bail procedure allows the KCPAO, when it is displeased with the bail set in District Court, to request bond increases in Superior Court without notice to the defense. It also permits Superior Court Judges to *sua sponte* increase bond where there are no allegations of bail violations and no requests by prosecutors as law enforcement. And, as often happens in *ex parte* matters, and in fact did occur in Petitioner’s case, the DPA presented irrelevant, erroneous and false facts and fallacious arguments without an opportunity for the defense to respond.

However, even if the King County Prosecuting Attorney’s Office had provided the audio recording or a transcript of the bail hearing below, the defense would still be prejudiced because it could not appear and confront the State’s “new information” presented at this critical phase. *See, e.g., State v. I.N.A.*, 9 Wn.App.2d 422, 426 (2019), “[b]asic due process and the governing criminal rules require notice of court proceedings to counsel of record.”

For the reasons stated, this Court should issue a writ of prohibition or mandamus directing the elected King County Prosecuting Attorney and

the Judges of the King County Superior Court to cease the unconstitutional *ex parte* procedure occurring in King County bail matters.

RESPECTFULLY SUBMITTED this 19th day of June, 2020.

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PROOF OF SERVICE

Sarah Conger swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 19th day of June, 2020, I filed the above Petitioner's Opening Brief via the Appellate Court E-File Portal through which Respondent's counsel listed below will be served:

Ann M. Summers
King County Prosecutor's Office
King County Courthouse
516 Third Avenue, W554
Seattle, WA 98104

And e-mailed to Petitioner.

DATED at Seattle, Washington this 19th day of June, 2020.

/s/ Sarah Conger
Sarah Conger, Legal Assistant

ALLEN, HANSEN, MAYBROWN, OFFENBECHER

June 19, 2020 - 9:41 AM

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