

FILED
SUPREME COURT
STATE OF WASHINGTON
10/5/2020 2:32 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.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	v
I. INTRODUCTION	1
II. THE DECLARATIONS OF JUDGES LUM AND DELAURENTI SHOULD BE REJECTED BECAUSE THEY DO NOT MEET THE REQUIREMENTS OF RAP 9.11 AND ARE ALSO IRRELEVANT TO THE ISSUES PRESENTED	2
A. The Declaration of Judge Dean Lum	3
B. Although the Law is Clear that a Witness Cannot Give a Legal Opinion, Judge Lum’s Declaration is Replete with Such Opinions.....	4
C. Judge Lum’s Statement that David Allen “acknowledged” that Most Defendants Benefited From the “ <i>ex parte</i> ” Procedure is Erroneous	6
D. Judge Lum’s Opinion at Page 2, ¶ 8, that the Great Majority of Defendants Have Their Bail Reduced or Not Increased, is Mostly Anecdotal and is Irrelevant to the Issue Presented in the Petition.....	7
E. Judge Lum’s Opinion that if there Was a Procedure Employed, as the Petitioner is Urging, That Provided Defendants Notice and the Ability to Appear at Bail Increase Hearings, that this Would Somehow Negatively Affect Their Rights, is Nonsensical	9
F. The Declaration of Retired District Court Judge Charles Delaurenti Offers Nothing that is Relevant to the Issues Presented in the Petition.....	11

III.	BOTH THE JUDGES AND THE KCPAO ERRONEOUSLY CONTEND THAT THIS MATTER SHOULD BE RESOLVED PURSUANT TO THE HOLDING IN <i>GERSTEIN</i> v. <i>PUGH</i> , A FOURTH AMENDMENT CASE WHICH CONSTRUED RIGHTS OF SUSPECTS ON THE ISSUE OF DETERMINATION OF PROBABLE CAUSE, NOT BAIL.....	12
IV.	RESPONDENT JUDGES’ OBJECTION TO PETITIONER’S PLEADING A VIOLATION OF THE FIFTH AMENDMENT DUE PROCESS CLAUSE IS BASICALLY IRRELEVANT	14
V.	REPLY TO KCPAO’S ARGUMENT THAT PROSECUTING ATTORNEYS ARE NOT STATE OFFICERS BECAUSE, UNLIKE JUDGES, THEY CANNOT BE IMPEACHED	15
VI.	THE JUDGES’ CONTENTION THAT SETTING AN EXPEDITED BOND HEARING TO CHALLENGE AN <i>EX</i> <i>PARTE</i> BOND INCREASE COULD BE DONE EXPEDITIOUSLY BECAUSE OF KING COUNTY SUPERIOR COURT RULES IS MISLEADING ERRONEOUS, AND IRRELEVANT	16
VII.	THE RESPONDENT JUDGES FAIL IN THEIR ATTEMPT TO DISTINGUISH THE HOLDING OF THE UNITED STATES SUPREME COURT’S DECISION IN <i>ROTHGERY</i> v. <i>TEXAS</i> ...	17
	A. The “Complaint” Filed in <i>Rothgery</i> was Identical to the Superform Filed in the District Court in <i>Pimentel</i>	17
	B. <i>Rothgery</i> Compels the Holding that Once an Attorney Appeared in District Court, the <i>Ex Parte</i> Hearings in <i>Pimentel</i> in Superior Court Would be a Critical Stage Where Counsel, Notice and a Hearing are Required	20
	1. Once attachment of counsel occurs, it continues through every critical stage of the proceeding	20
	2. Where counsel’s presence is necessary to protect his rights, this constitutes a “critical stage”	21

C.	The Proceedings in District Court and Superior Court Constitute the Same Matter.....	22
D.	Washington Court Rules Likewise Require Appointment of Counsel at the First Appearance	23
VIII.	REPLY TO JUDGES’ CONTENTION THAT THE SUPERIOR COURT DID NOT EXCEED ITS JURISDICTION BECAUSE IT COMPLIED WITH APPLICABLE COURT RULES AND STATUTES.....	24
A.	The Court Rules that Respondents’ Rely On to Justify Their Actions Do Not Pertain to the Issues Presented	24
B.	If these Court Rules Were Read in a Manner to Make Them Applicable in a Case Where There Was a First Appearance in District Court, the Rules Would Be Unconstitutional ..	25
IX.	REPLY TO THE JUDGES AND KCPAO’S ARGUMENT THAT A WRIT CANNOT ISSUE BECAUSE THERE EXISTS A PLAIN, SPEEDY AND ADEQUATE REMEDY	26
X.	EVEN IF THERE WAS A PROCEDURE IN PLACE TO PERMIT A DEFENDANT WHOSE DISTRICT COURT BAIL AMOUNT (OR PR) HAD BEEN RAISED <i>EX PARTE</i> IN SUPERIOR COURT TO EXPEDITIOUSLY CHALLENGE THE INCREASE, THIS WOULD NOT BE AN ADEQUATE REMEDY TO CURE AN UNCONSTITUTIONAL <i>EX PARTE</i> BAIL INCREASE.....	29
XI.	PETITIONER HAS PROPERLY PLED THIS MATTER AS A WRIT	30
A.	This Court Has Held 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	30
B.	This Court Has Held Many Times That if the Requisites for a Particular Writ of Prohibition are Not Met, Then it	

	Should Exercise its Discretion and Consider it as a Petition for an Alternate Writ.....	31
C.	Neither Respondent Addressed the <i>Ishikawa</i> and <i>Serko</i> Holdings Raised in Petitioner’s Opening Brief	31
XII.	A REMEDY MUST PREVENT THE RESPONDENTS FROM AVOIDING A HEARING BY DELAYING THE <i>EX PARTE</i> REQUEST FOR AN INCREASE IN BAIL UNTIL AFTER THE CASE IS DISMISSED OFF THE DISTRICT COURT CALENDAR AT THE SECOND APPEARANCE	34
XIII.	CONCLUSION.....	36
	APPENDIX A	
	PROOF OF SERVICE	

TABLE OF AUTHORITIES

Federal Cases

<i>Gerstein v. Pugh</i> , 420 U.S. 103 (1974).....	12, 13
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970)	29
<i>Malinski v. New York</i> , 324 U.S. 401 (1945)	15
<i>Rothgery v. Gillespie County, Texas</i> , 554 U.S. 191 (2008)....	17, 19, 20, 21
<i>Rothgery v. Gillespie Cty., Tex.</i> , 413 F.Supp.2d 806 (W.D. Tex. 2006)..	18
<i>Rothgery v. Gillespie Cty., Tex.</i> , 491 F.3d 293 (5th Cir. 2007).....	19, 20
<i>U.S. v. James Daniel Good Real Property</i> , 510 U.S. 43 (1993).....	29

State Cases

<i>Clark Cy. Sheriff v. Department of Social & Health Servs.</i> , 95 Wash.2d 445 (1981).....	33
<i>Dept. of Ecology v. State Finance Committee</i> , 116 Wn.2d 246 (1991)....	33
<i>Freeman v. Gregoire</i> , 171 Wn.2d 316 (2011)	31, 32
<i>Lee v. State</i> , 185 Wn.2d 608 (2016).....	30
<i>Minehart v. Morning Star Boy’s Ranch</i> , 156 Wn.App. 457 (2010).....	27
<i>Riddle v. Elofson</i> , 193 Wn.2d 423 (2019).....	27
<i>Seattle Times v. Ishikawa</i> , 97 Wn.2d 30 (1982)	31, 32, 33
<i>Seattle Times v. Serko</i> , 170 Wn.2d 581 (2010).....	31, 33
<i>State ex rel. Distilled Spirits Institute v. Kinnear</i> , 80 Wn.2d 175 (1972).....	31, 35

<i>State ex rel. O’Connell v. Yelle</i> , 51 Wn.2d 620 (1958)	32
<i>State v. Barton</i> , 181 Wn.2d. 148 (2014)	27, 28
<i>State v. Everybodytalksabout</i> , 161 Wn.2d 702, (as amended (Nov. 2, 2007)).....	21
<i>State v. Stevens County District Court Judge</i> , 194 Wn.2d 898 (2019).....	21, 22
<i>State v. Superior Court of Grays Harbor Co.</i> , 29 Wn.2d 725 (1948)	31
<i>State v. Villela</i> , 194 Wn.2d 451 (2019).....	26, 29
<i>State v. Watson</i> , 155 Wn.2d 574 (2005)	5
<i>Stenger v. State</i> , 104 Wn.App. 393 (2001)	6
<i>Tortes v. King Cty.</i> , 119 Wn.App. 1 (2003).....	6
<i>Van Blaricom v. Kronenberg</i> , 112 Wn.App. 501 (2002).....	30
<i>Walker v. Munro</i> , 124 Wn.2d 402 (1994).....	33
<i>Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.</i> , 122 Wn.2d 299 (1993).....	6

Court Rules

CrR 2.2.....	24
CrR 3.1(a)	22
CrR 3.1(b)	22, 23
CrR 3.2.....	23
CrR 3.2(k)	23
CrR 3.2(k)(1).....	24
CrR 3.2(l)	23
CrR 3.2.1.....	22
CrR 3.2.1(e)	23

CrRLJ 3.1(a)	22
CrRLJ 3.1(b)	22, 23
CrRLJ 3.2	23
CrRLJ 3.2.1(a)	12, 22
CrRLJ 3.2.1(e)	23
LCrR 2.2(g)	10
RAP 2.3(b)(4)	28
RAP 3.3(f)	11
RAP 9.11	2
RPC 3.3(f)	10

Federal Constitutional Provisions

United States Constitution Amendment IV	12, 13, 14
United States Constitution Amendment V	14, 15
United States Constitution Amendment VI	14, 21
United States Constitution Amendment XIV	14, 15

State Statutes

Article 1 § 14 of the Washington State Constitution	14
Article 1 § 20 of the Washington State Constitution	14, 28
Article 1 § 22 of the Washington State Constitution	14
Article 1 § 35 of the Washington State Constitution	3
Article 4, § 9 of the Washington State Constitution	15, 16
Article 5, § 2, of the Washington State Constitution	15, 16

I. INTRODUCTION

After Petitioner timely filed his Opening Brief on June 19, 2020, Respondent Judges of the King County Superior Court (hereinafter “Judges”) who with Respondent Satterberg (hereinafter “KCPAO”) were previously jointly represented by Ms. Summers, a King County Senior Deputy Prosecuting Attorney (hereinafter “DPA”), retained separate representation. Respondent Judges new attorneys filed a Notice of Appearance on July 9, 2020 and on August 5, 2020 filed a request for an extension and a motion to supplement the record.

On August 14, 2020, the Judges filed the Declarations of Superior Court Judge Dean Lum and retired King County District Court Judge Charles Delaurenti, who was the judge at Petitioner’s District Court appearances. On August 17, 2020, this Court granted the Respondent Judges’ request to supplement the record. Respondent Judges and the KCPAO filed their opening briefs and the Declarations of Judges Lum and Delaurenti on September 4, 2020.

Petitioner Pimentel is at a disadvantage because there is no procedure allowing him to file declarations contradicting portions of the declarations filed by the Judges.¹ Nevertheless, as will be demonstrated,

¹ And even if such a procedure existed, it would delay the November 17, 2020, oral argument date, which the Petitioner desires to keep in place.

the Judges' declarations do not satisfy the requirements of RAP 9.11 and, in any event, are irrelevant to the issues presented in the Writ.²

II. THE DECLARATIONS OF JUDGES LUM AND DELAURENTI SHOULD BE REJECTED BECAUSE THEY DO NOT MEET THE REQUIREMENTS OF RAP 9.11 AND ARE ALSO IRRELEVANT TO THE ISSUES PRESENTED

RAP 9.11 "Additional Evidence on Review" sets forth six requirements that must all be met before additional evidence is allowed to supplement the appellate record. The rule provides in its relevant portion that:

(a) Remedy Limited. The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

As will be shown, the Declarations do not meet these cumulative requirements and should be rejected. Additionally, these Declarations do

² Petitioner is therefore not requesting an evidentiary hearing.

not address the Constitutional issues raised in the Writ concerning the *ex parte* procedure.

A. The Declaration of Judge Dean Lum³

King County Superior Court Judge Lum, who was not involved in the *Pimentel* matter, executed a 3-page declaration. On page 3, ¶ 10 Judge Lum wrote about a meeting that occurred with Petitioner’s attorney, David Allen, at which time “concerns that are now a subject of this matter” were discussed.⁴ Judge Lum stated he told Allen at that meeting that “the Court would grant a request [for an emergency bail hearing] on shortened time if formally requested.” He writes:

Mr. Allen thanked me for the offer, but said it did not fully address his concerns. I do not recall any such hearings being requested, and in my review of the record, Mr. Pimentel did not pursue a pre-arraignment bail hearing in this matter.

What Judge Lum did not include was that the KCPAO objected to expedited bail hearings, especially because of staffing issues and the difficulty providing notice of this expedited hearing to the “victim” pursuant to the Victim’s Bill of Rights, Article 1, § 35 of the Washington State

³ The undersigned attorney has known Judge Lum professionally since the Judge was a King County DPA in the 1980’s when they tried cases against each other, and while they sometimes disagree, he has a great deal of respect for Judge Lum and his professionalism and fairness.

⁴ See Second Declaration of David Allen, (henceforth Declaration of David Allen), ARP 64-067, Appendix C, which is a letter dated June 30, 2016, referenced a meeting to discuss the bail increase procedure with Judge Lum and KCPAO attorneys on April 13, 2016.

Constitution. Nor did Judge Lum’s ‘offer’ address the issue of *ex parte* contacts between the KCPAO and Judges or the lack of prior notice to a defendant after counsel appeared at the District Court bail hearing, a critical stage, but instead only a hearing after bail was already increased and the defendant arrested.

Moreover, the “offer” would still require defense counsel to file a motion for an expedited hearing, which as explained in Petitioner’s Opening Brief, did not prevent a defendant such as Petitioner, who had been released on PR or bailed out, from being re-arrested when appearing in District Court for his second appearance nor would it remedy the constitutional notice and hearing issues raised in this Petition.

B. Although the Law is Clear that a Witness Cannot Give a Legal Opinion, Judge Lum’s Declaration is Replete with Such Opinions

At ¶ 7, page 1, Judge Lum opines that Superior Court Judges are not bound by the first appearance decisions of the District Court. He also states that the Superior Court has the right to review additional information from the prosecution and “this review process is non-adversarial nature [sic], and not considered an ‘*ex parte* communication.’” *Id.* at ¶ 7, pp. 1-2.

Judge Lum is simply wrong when he says that this was not an *ex parte* communication even though defense counsel has already appeared in this same matter the prior day in District Court.⁵

Ex parte communications with the Court occur when:

Black's Law Dictionary defines “*ex parte* communication” as “[a] communication between counsel and the court when opposing counsel is not present.” BLACK'S LAW DICTIONARY 296 (8th ed.2004). That definition assumes that there is a proceeding involving the court, with counsel and opposing counsel, and that the communication regards the proceeding at hand. *Black's* further defines “*ex parte*” as something being made by one party: “Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested; of or relating to court action taken by one party without notice to the other.” *Id.* at 616, 80 P.3d 605; *see also State v. Moen*, 129 Wash.2d 535, 541 n. 3, 919 P.2d 69 (1996) (“By definition, an *ex parte* order is done on the application of one party”). *Black's* multiple definitions of “party” also assume that a cause of action exists in which the party is a participant. *See BLACK'S, supra*, at 1154.

State v. Watson, 155 Wn.2d 574, 579 (2005). Clearly, the State’s motion in *Pimentel* for increased bond after the arrestee and his attorney appeared in District Court was an *ex parte* communication.

Irrespective, no individual, whether a lay person, an expert or even a judge (who is not deciding the matter at hand), is permitted to offer a legal opinion in a pending court case:

⁵ *See* Section VII(C), *infra*, where the issue of what constitutes a ‘matter’ is discussed.

Legal opinions on the ultimate *legal* issue before the court are not properly considered under the guise of testimony. It is the responsibility of the court deciding a sanction motion to interpret and apply the law.

Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 344 (1993) (emphasis added).

Nor, can a witness offer what could be described as a conclusion of law. *Tortes v. King Cty.*, 119 Wn.App. 1, 12-13 (2003); *Stenger v. State*, 104 Wn.App. 393, 407-09 (2001).

C. Judge Lum's Statement that David Allen "acknowledged" that Most Defendants Benefited From the "ex parte" Procedure is Erroneous

Judge Lum also claims that attorney David Allen "acknowledged" at the 2016 meeting that the *ex parte* procedure benefits "the vast majority of defendants." Pg. 2, ¶ 8. The undersigned disputes this and believes there must be a misunderstanding, as evidenced by Allen's Declaration in the record (*see* ARP 038-067), that contains letters he has written over 25 years, which detail many of the cases he has been involved in where bond has been increased *ex parte*, clearly to the prejudice of his clients. *See also*: Declarations of attorneys Muth (ARP 068-070); Goldsmith (ARP 071-073); and, Gause (ARP 074-076), referencing similar cases where bond was also increased *ex parte* to the detriment of their clients.

Moreover, common sense would indicate that neither the undersigned attorney nor the other attorneys who wrote declarations would be donating their time and considerable efforts in challenging this *ex parte* procedure if it was actually ‘benefiting’ their clients.

D. Judge Lum’s Opinion at Page 2, ¶ 8, that the Great Majority of Defendants Have Their Bail Reduced or Not Increased, is Mostly Anecdotal and is Irrelevant to the Issue Presented in the Petition

The King County Superior Court currently has 53 Judges.⁶ Without providing any specific details or records or the basis for his knowledge other than his own rulings on an unknown number of these matters, Judge Lum provides a mostly anecdotal opinion that most defendants would not have their bail increased and some even have bail decreased and therefore benefit from this *ex parte* procedure. *See* Lum Decl., p. 2, ¶ 8.

Judge Lum’s declaration fails to provide important facts about his own experiences with the procedure, such as the number of these cases or any details when he has personally reduced bail *ex parte*; the number of his rulings on these matters versus other judges; the span of dates (or years) when he was in the position to so rule; or other important details including

⁶ Judge Lum is currently listed as the Judge sitting on the Drug Court. *See*: <https://www.kingcounty.gov/~media/courts/superior-court/docs/judges/judicial-assignments.ashx?la=en>

the name or cause number of even a single case where this was done. Judge Lum's declaration as to what other unnamed judges have told him they have done on *ex parte* requests for bail increases in other unidentified cases is clearly anecdotal.⁷

At page 2, ¶ 11, Judge Lum writes that the Superior Court has not employed these procedures "so as to deprive any defendant of any right." Like many of his other statements, this is an inadmissible legal conclusion and without foundation in that he claims to speak for all of the King County Superior Court Judges over the decades. Moreover, the issue is not whether the Court **intended** to deprive defendants of rights, but instead whether this *ex parte* procedure **has** deprived them of rights. As shown, and especially demonstrated in *Pimentel* and cases recounted in the Declarations of attorneys Allen, Goldsmith, Muth and Gause, defendants in these matters were in fact substantially prejudiced by the *ex parte* procedure.

⁷ Unlike examples of cases where bail was raised *ex parte* provided in attorneys Allen, Gause, Goldsmith and Muth declarations, (ARP 038-082) where the case captions and cause numbers were included, or were provided to DPA Summers, Respondent Judges' former attorney, to include in her declaration (ARP 077-082). Judge Lum provides none of this information. Nor does Judge Lum claim that he has reviewed reports, records or statistics demonstrating this, if they even exist, or in fact what his source of knowledge was, other than speaking informally with some other, unnamed judges.

E. Judge Lum’s Opinion that if there Was a Procedure Employed, as the Petitioner is Urging, That Provided Defendants Notice and the Ability to Appear at Bail Increase Hearings, that this Would Somehow Negatively Affect Their Rights, is Nonsensical

Judge Lum’s opinion at page 3, ¶ 11 of his Declaration that the procedure requested by Petitioner would “delay and have a potentially adverse effect” on access to justice and would delay release, does not make sense. For example, Petitioner Pimentel was released from jail when the District Judge granted him a PR release. Assuming that a hearing with notice in Superior Court was required prior to a bail increase, this would not have delayed his release in District Court and he would have remained out of custody at least until a Superior Court hearing was held.⁸

In the case of a defendant where bail was set in District Court but could not post bond, it is speculative at best that a Superior Court Judge would *sua sponte* reduce the bond amount set in District Court thereby allowing the defendant to be released as Judge Lum opines. This is especially problematic as shown in *Pimentel*, given the fact that KCPAO prosecutors typically fail to provide any information helpful to the defense

⁸ Under a procedure where notice and a hearing was required, assuming the Superior Court raised bond at a contested hearing, at a minimum a defendant would have immediate knowledge of this and, if financially able to do so, have the bonding agent in the courtroom and be able to then post the increased bond rather than be summarily arrested at a second appearance or by the case detective later, as has often occurred. *See*: Declarations of Allen, Muth, Goldsmith and Gause. ARP 038-076.

regarding the reasons why the individual is safe to be at large, on either a PR or lower bond, to the Superior Court judge at the *ex parte* procedure, after just requesting bond in District Court. As shown in the Allen, Goldsmith, Gause and Muth Declarations, the information provided by the State to the Superior Court Judge is typically just the amount of bail (or PR) set by the District Court Judge and the detective's Certificate of Probable Cause.

The Certificate of Probable Cause ("Certificate") is never a defense friendly document but instead contains all those reasons why the investigating detective believes probable cause exists and why charges should be filed. In cases such as *Pimentel*, when there is helpful information in the detective's earlier submissions in the District Court (although not contained in the Certificate), such as where the detective wrote in his "Superform" (ARP 011-012) that he had no objection to release, this is not typically provided by the KCPAO to the Superior Court Judge⁹ nor, in spite of the KCPAO's enhanced duties under RPC 3.3(f) "Candor to the Tribunal," was it provided in *Pimentel*.¹⁰

⁹ The KCPAO provided only the first page of the "Superform" to the Superior Court. ARP 022. This page did not include the detective's statement that he had **no** objection to release. ARP 012.

¹⁰ Although RPC 3.3(f) "Candor towards the tribunal" imposes an enhanced duty of candor in *ex parte* proceedings, and King County local rule LCrR 2.2(g) requires the State to provide the reviewing Superior Court Judge with the pretrial release interview form, this was not done in *Pimentel*. See *Pimentel* Opening Brief at pp. 8-9; 36-39.

F. The Declaration of Retired District Court Judge Charles Delaurenti Offers Nothing that is Relevant to the Issues Presented in the Petition

Retired District Court Judge Delaurenti's Declaration simply recounted the procedure employed in the District Court relating to the *Pimentel* matter.

The Respondent Judges in their Brief attempt to make much of the fact that he stated on the record that "the State's [requested] bond is not unreasonable." Nevertheless, he granted a PR, stating on the record that:

The information before me also included the Detective's non-objection to Mr. Pimentel being released on his personal recognizance, and the jail screener's recommendation for that decision.

Delaurenti Declaration p. 2, ¶ 8. However, neither of these documents nor this information was provided by the KCPAO when it requested that Judge Cayce order a bond of \$50,000, rather than a PR (ARP 017-022). *See*: RAP 3.3(f).¹¹

¹¹ The version of the "Superform" presented to the Superior Court (ARP 022) did not include its second page, which contained the detective's no objection to release statement. *See* ARP 012.

III. BOTH THE JUDGES AND THE KCPAO ERRONEOUSLY CONTEND THAT THIS MATTER SHOULD BE RESOLVED PURSUANT TO THE HOLDING IN GERSTEIN v. PUGH, A FOURTH AMENDMENT CASE WHICH CONSTRUED RIGHTS OF SUSPECTS ON THE ISSUE OF DETERMINATION OF PROBABLE CAUSE, NOT BAIL

Both the Respondent Judges and the KCPAO argue that this matter should be resolved by *Gerstein v. Pugh*, 420 U.S. 103 (1974), which permits a court to determine probable cause *ex parte*. As will be shown, *Gerstein* is a narrow holding that applies only to Fourth Amendment probable cause determinations and is not applicable to the issue presented here involving an *ex parte* hearing raising bail where a defendant and counsel have previously appeared in District Court.¹²

In *Gerstein*, a Florida prisoner challenged a procedure whereby persons arrested without a warrant and charged by information could be jailed or subjected to other restraints by just a prosecutor's determination of probable cause, without judicial review, at least until the arrestee was detained for at least 30 days. Under then existing Florida law, while a first appearance hearing to set bail was required within 24 hours after a person was arrested, the judge did "not make any determination of probable cause."

¹² In Washington, as occurred in *Pimentel*, the District Judge at the first appearance in District Court makes the Fourth Amendment probable cause determination (as well as the bail decision) on the record at a contested hearing with counsel and the defendant present in court. CrRLJ 3.2.1(a).

Id. at 106. “As a result, a person charged by information could be detained for a substantial period solely on the decision of a prosecutor.” *Id.*

Gerstein held that although a police officer’s assessment of probable cause provided legal justification for the initial arrest of a suspect, once the person was in jail the probable cause determination could not be made by the prosecutor. Instead, “we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.” *Id.* at 114.

The *Gerstein* Court also held that this probable cause determination under the Fourth Amendment “can be determined reliably without an adversary hearing.” *Id.* at 120. The Court justified this by explaining that probable cause “traditionally has been decided by a magistrate in a non-adversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.” *Id.*

Contrary to the Judges’ and KCPAO’s position, *Gerstein* is strictly limited to a Fourth Amendment probable cause determination, and does not pertain to bail hearings. In fact, in *Gerstein* the issue of bail had already been decided at a hearing in open court at *Gerstein*’s first appearance. *Id.* at 108.

Gerstein therefore did not address the issue presented in this writ as to whether an individual has the right to notice and a hearing where the state

requests an increase in bail after it was set at a prior hearing in the same matter, which implicates Fourteenth Amendment Due Process and Sixth Amendment issues, as well as violations of related clauses of the Washington State Constitution, rather than a Fourth Amendment issue.

IV. RESPONDENT JUDGES' OBJECTION TO PETITIONER'S PLEADING A VIOLATION OF THE FIFTH AMENDMENT DUE PROCESS CLAUSE IS BASICALLY IRRELEVANT

In his Application for a Writ of Prohibition, Petitioner alleged that the *ex parte* bond increase practice “violates the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article 1, §§ 14 [excessive bail], 20 [bail, when authorized] and 22 [rights of the accused] of the Washington State Constitution, court rules and ethics rules for lawyers and judges.” Petition at p. 17. This is repeated in Petitioner’s Opening Brief at pages 24 and 36. The Judges argue in their brief at page 38 that the Fifth Amendment’s Due Process Clause (hereinafter DPC) only applies to actions by the federal government, and not to the States, and is therefore mispleaded.

Whether or not this is the case is irrelevant because Petitioner also alleged a violation of the DPC of the Fourteenth Amendment, which clearly does apply to the States. Moreover, the Fifth Amendment and Fourteenth Amendment DPCs are essentially equivalent:

To suppose that “due process of law” meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection. (*Emphasis added*).

Malinski v. New York, 324 U.S. 401, 414-15 (1945) (Frankfurter, J., concurring).

While any difference between the DPC(s) of the Fifth and Fourteenth Amendments may be interesting from an academic or intellectual perspective, it is immaterial to the merits of this Petition where a violation of the DPC of the Fourteenth Amendment is also alleged.

V. REPLY TO KCPAO’S ARGUMENT THAT PROSECUTING ATTORNEYS ARE NOT STATE OFFICERS BECAUSE, UNLIKE JUDGES, THEY CANNOT BE IMPEACHED

The KCPAO argues at pages 28-30 of its Brief that a prosecutor is not a state officer because, unlike judges, he is not subject to impeachment under Article 5, § 2, of the Washington State Constitution.

However, this argument ignores that the legislature, pursuant to Article 4, § 9 of the Washington State Constitution, can remove “any judge of any court of record, the attorney general or any prosecuting attorney” by a vote where three-quarters of the members of the legislature concur, “for incompetency, corruption, malfeasance, or delinquency in office, or other sufficient cause stated in such resolution,” which is tantamount to impeachment.

Therefore, the KCPAO's argument that because prosecutors are not subject to impeachment pursuant to Article 5 § 2 means they are not a state officer fails because of Article 4, § 9, which accomplishes the same result.

VI. THE JUDGES' CONTENTION THAT SETTING AN EXPEDITED BOND HEARING TO CHALLENGE AN *EX PARTE* BOND INCREASE COULD BE DONE EXPEDITIOUSLY BECAUSE OF KING COUNTY SUPERIOR COURT RULES IS MISLEADING ERRONEOUS, AND IRRELEVANT

The Judges' assert at pages 22-23 of their brief that Defendant Pimentel could have availed himself of the procedure in the King County Superior Court Criminal Department Manual (hereinafter "Manual") at Section 7, page 17, which they contend allows bond hearings to be set on the calendar "as soon as possible (shorter than six days)."

What the Judges do not explain is that this expedited procedure would not have been available to Petitioner Pimentel because he was charged with a sex crime which the Manual specifically excludes from an expedited review. The Manual states: "DV or SAU hearings will still require six days' notice." Manual, p. 17.¹³ Moreover, an expedited bail hearing after an *ex parte* increase in bail and arrest, does not cure a due process violation. *See* Section X, *infra*.

¹³ The relevant pages of the Manual are attached hereto as Appendix A for the Court's convenience

VII. THE RESPONDENT JUDGES FAIL IN THEIR ATTEMPT TO DISTINGUISH THE HOLDING OF THE UNITED STATES SUPREME COURT'S DECISION IN ROTHGERY v. TEXAS

A. The “Complaint” Filed in *Rothgery* was Identical to the Superform Filed in the District Court in *Pimentel*

Rothgery v. Gillespie County, Texas, 554 U.S. 191 (2008), which was cited and argued extensively in Petitioner’s Opening Brief at pages 31-36, holds that a person arrested on probable cause for a felony must be afforded counsel at or near his first appearance.¹⁴

The Judges at page 31 of their brief attempt to distinguish this precedent, arguing that the right to counsel only attaches after charges are actually filed, as in *Rothgery*, where the opinion states he was charged by “complaint” at the time of his first appearance. Judges’ Brief at pp. 31-32. However, as will be shown, the so-called “complaint” in *Rothgery* was merely a probable cause affidavit filed by the arresting officer, without prosecutorial involvement or even their knowledge, essentially identical to the “Superform” filed by the detective in *Pimentel* in District Court which contained a “Statement of Probable Cause: Non-Vucsa Felony.” ARP 011-012.

¹⁴ Petitioner apologizes for not listing the pages in his Table of Cases in his Opening Brief where *Rothgery* is cited, which a computer generated Table of Cases erroneously listed as “*passim*.”

The underlying U.S. District Court’s decision dismissing Rothgery’s civil rights case, which was later reversed by the Supreme Court, is still helpful as to the undisputed procedural facts and makes it clear that “no formal charges” had been instituted at the time of his bail hearing but instead just a “probable cause affidavit,” signed by the police officer:

In light of this Court’s determination that no formal charges had been filed against Rothgery with the presentation of the probable-cause affidavit to Judge Schoessow, the Court agrees with Gillespie County that Rothgery’s appearance before Judge Schoessow “on July 16, 2002 did not initiate adversary judicial proceedings under Texas Law. (Emphasis added.)

Rothgery v. Gillespie Cty., Tex., 413 F.Supp.2d 806, 814 (W.D. Tex. 2006), aff’d, 491 F.3d 293 (5th Cir. 2007), vacated 554 U.S. 191, 128 S. Ct. 2578, 171 L.Ed.2d 366 (2008).

Likewise, the *Rothgery* Federal Court of Appeals wrote in its now reversed appellate decision (which is likewise still relevant on the issue of the underlying procedural facts), that the arresting officer, who filed the probable cause affidavit (or complaint) could not cause charges to be filed:

It is undisputed in this appeal that the relevant prosecutors were not aware of or involved in Rothgery’s arrest or appearance before the magistrate on July 16, 2002. **There is also no indication that the officer who filed the probable cause affidavit at Rothgery’s appearance had any power to commit the state to prosecute without the knowledge or involvement of a prosecutor. (Emphasis added.)**

Rothgery v. Gillespie Cty., Tex., 491 F.3d 293, 297 (5th Cir. 2007), vacated, 554 U.S. 191, 128 S. Ct. 2578, 171 L.Ed.2d 366 (2008).

The Supreme Court accepted the defendant county's position that the County's prosecutor's office was not aware of the first appearance proceeding and that the police officer who arrested the defendant and filed the probable cause affidavit (which was entitled "complaint"), had no power to compel the prosecutor to file charges. 554 U.S. at 197-198. Nevertheless, the right to counsel attached when Rothgery was brought before a magistrate for a first appearance. *Id.* at 194-195.

The *Rothgery* Supreme Court opinion explained at footnote 9 that its holding did not depend on the nature of the "complaint" filed by the arresting officer or whether or not it was a "formal complaint" under Texas law:

The Court of Appeals did not resolve whether the arresting officer's formal accusation would count as a "formal complaint" under Texas state law. *See* 491 F.3d, at 298–300 (noting the confusion in the Texas state courts). But it rightly acknowledged (albeit in considering the separate question whether the complaint was a "formal charge") that the constitutional significance of judicial proceedings cannot be allowed to founder on the vagaries of state criminal law, lest the attachment rule be rendered utterly "vague and unpredictable." *Virginia v. Moore*, 553 U.S. 164, 175, 128 S.Ct. 1598, 1606, 170 L.Ed.2d 559 (2008). *See* 491 F.3d, at 300 ("**[W]e are reluctant to rely on the formalistic question of whether the affidavit here would be considered a 'complaint' or its functional equivalent under Texas case law and Article 15.04 of the Texas Code**

of Criminal Procedures—a question to which the answer is itself uncertain. Instead, we must look to the specific circumstances of this case and the nature of the affidavit filed at Rothgery’s appearance before the magistrate” (footnote omitted)). What counts is that the complaint filed with the magistrate accused Rothgery of committing a particular crime and prompted the judicial officer to take legal action in response (here, to set the terms of bail and order the defendant locked up). (Emphasis added).

Rothgery, id. at 199, n. 9.

As the *Rothgery* Court emphasized, the crucial factor is that the police officer’s probable cause affidavit resulted in him being brought before a judicial officer where bail was set, not whether this document constituted a formal charge. *Id.* The *Rothgery* “Complaint” was equivalent to the *Pimentel* “Superform” (which contained the “statement of probable cause”) the detective in *Pimentel* filed in the District Court. ARP 10-11.

B. Rothgery Compels the Holding that Once an Attorney Appeared in District Court, the Ex Parte Hearings in Pimentel in Superior Court Would be a Critical Stage Where Counsel, Notice and a Hearing are Required

1. Once attachment of counsel occurs, it continues through every critical stage of the proceeding

Applying this holding to *Pimentel*, once the right to counsel attached at the District Court’s first appearance calendar, it continued through to the hearing the next day where the KCPAO requested the Superior Court to increase bond to \$50,000. *Rothgery* explains that once “attachment” of the

right to counsel occurs, an individual is continually entitled to counsel at any later critical stage of the proceedings. *Id.* at 212. Petitioner was therefore entitled to notice and to appear with an attorney to challenge the bond increase at that critical stage.

2. Where counsel’s presence is necessary to protect his rights, this constitutes a “critical stage”

As demonstrated *supra*, determining whether a hearing in the same matter is a critical stage is a straightforward determination of whether counsel is necessary to protect an individual’s rights at an adversarial stage of the proceedings:

Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any “critical stage” of the postattachment proceedings; what makes a stage critical is what shows the need for counsel’s presence. Thus, counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.

Rothgery, 554 U.S. at 212. *See also: State v. Everybodytalksabout*, 161 Wn.2d 702, 708, (as amended (Nov. 2, 2007)) (statements of a convicted defendant at a presentence interview where counsel was not present nor waived, which was a critical stage, violated Sixth Amendment); *State v. Stevens County District Court Judge*, 194 Wn.2d 898, 904 (2019)(citing *State v. Everybodytalksabout, id.*, this court reiterated that the term critical stages “are traditionally exclusive to whether a defendant has the right to assistance of counsel.”).

**C. The Proceedings in District Court and Superior Court
Constitute the Same Matter**

Washington law provides parallel procedures in either District Court or Superior Court, at the discretion of the prosecutor, for first appearances of suspects who either surrendered, like Pimentel, or were arrested on probable cause. *See*: CrR 3.2.1 and CrRLJ 3.2.1(a). Both the Superior Court and District Court rules are identical in that such persons shall be appointed counsel at their first appearance before “a committing magistrate, or is formally charged, whichever occurs earliest.” *See*: CrR 3.1(a) and (b) and CrRLJ 3.1(a) and (b). As set forth in the Declaration of Allen (ARP 046), many counties, unlike King County, conduct their first appearance calendars in Superior Court.

The proceedings in District and Superior Court clearly involve the same matter. For example, in *Pimentel* the suspect, the complainant and the witnesses are the same. The alleged facts were also identical. And the proposed charge in District Court, indecent liberties, and actual charge, assault in the second degree with intent to commit indecent liberties, were essentially identical.

In those counties where the prosecutor schedules the first appearance in Superior Court pursuant to CrR 3.2.1 and where bail is set at

that hearing, it seems obvious that another superior court judge would not be permitted to *ex parte* raise that bail, without notice of a hearing.¹⁵

D. Washington Court Rules Likewise Require Appointment of Counsel at the First Appearance

Washington District Court rules, CrRLJ 3.1(b); 3.2; 3.2.1(e) mandate that an arrestee shall be furnished a lawyer no later than the point he or she first appears before a judge, irrespective of whether charges have been filed.¹⁶ Once an individual has a first appearance, this rule (as well as its Superior Court counterparts CrR 3.1(b); 3.2 and 3.2.1(e)), would mandate the appointment and appearance of a lawyer, as well as a hearing, especially where the State requests a bond increase. The only exception to this would be if the State alleges that there has been a violation of the previously imposed conditions of release, which was not alleged in Pimentel or the other cases mentioned in the Declarations provided (see ARP 038-076), at which time an *ex parte* hearing could be held, although a contested hearing must be set as soon as possible afterwards. *See*: CrR 3.2(l).

CrR 3.2(k) states:

(k) Amendment or Revocation of Order.

¹⁵ The only exception would be where there was an allegation that the person was released on PR or Bail and violated the bail conditions. *See*: CrR 3.2(l) “Arrest for violation of Conditions.”

¹⁶ Parallel rules apply in Superior Court. *See*: CrR3.1(b) and 3.2.1(e).

(1) The court ordering the release of an accused on any condition specified in this rule 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.

If CrR3.2(k)(1) is interpreted to permit a judge to raise bail *ex parte*, as was done in Pimentel, then it is unconstitutional. *See* Section VIII(B), *infra*.

VIII. REPLY TO JUDGES' CONTENTION THAT THE SUPERIOR COURT DID NOT EXCEED ITS JURISDICTION BECAUSE IT COMPLIED WITH APPLICABLE COURT RULES AND STATUTES

A. The Court Rules that Respondents' Rely On to Justify Their Actions Do Not Pertain to the Issues Presented

The Judges argue at page 14 of its brief that because Judge Cayce complied with CrR 2.2 in raising Petitioner's bail, his actions in doing so did not violate Pimentel's constitutional rights and therefore he did not act beyond his jurisdiction in his *ex parte* increase in bail. This same argument is utilized by the KCPAO in contending that its request for an *ex parte* bail increase did not violate Pimentel's constitutional rights.

CrR 2.2 "Warrant of arrest and summons" nowhere mentions the first appearance proceeding in District Court. A reading of CrR 2.2 demonstrates that this rule is applicable when the state commences a prosecution directly into Superior Court, with a suspect at large, such as when the prosecutor requests an arrest warrant, rather than starting it in

District Court after an arrest without a warrant, as in *Pimentel*. In a situation such as this, the matter is not one that is already pending, as was *Pimentel*, with an appearance by the defendant and his attorney before a judge in District Court.

While this rule sets out a procedure for the Superior Court to follow, it in no way recognizes or deals with the issue raised in this Writ. Nor, does this rule in any way address the issue of whether a Superior Court exceeds its jurisdiction where, as here, it decides a bail increase matter without notice to the defendant or his or her attorney, where the matter is already pending.

B. If these Court Rules Were Read in a Manner to Make Them Applicable in a Case Where There Was a First Appearance in District Court, the Rules Would Be Unconstitutional

Assuming, as the Respondents argue, that a court rule gives the Superior Court authority to conduct *ex parte* bail hearings after an appearance by counsel and bail is first set at a hearing in District Court, such a rule would be unconstitutional. Neither a court rule nor even a statute passed by the legislature can override the United States or the Washington State Constitutions:

Our constitution cannot be amended by statute, and while the legislature can give more protection to constitutional rights through legislation, it cannot use legislation to take that protection away.

State v. Villela, 194 Wn.2d 451, 454 (2019) (statute mandating mandatory impound of vehicle following DUI arrest was unconstitutional).

Where the Superior Court utilizes the *ex parte* practice that violates defendants' constitutional rights, such a practice is in excess of the court's jurisdiction.

IX. REPLY TO THE JUDGES AND KCPAO'S ARGUMENT THAT A WRIT CANNOT ISSUE BECAUSE THERE EXISTS A PLAIN, SPEEDY AND ADEQUATE REMEDY

Both the Judges and the KCPAO argue in their briefs that a writ of mandamus cannot issue because there exists "a plain, speedy, and adequate remedy" at law. *See* Judges' Brief at p. 26; KCPAO Brief at 14. One of the remedies suggested in the Judges' brief at page 26 is that a defendant could request an emergency bail hearing, citing to the Superior Court Criminal Department Manual. As shown, the Manual excludes SAU cases. Other remedies suggested in the Judges' brief would be to wait the 14 days for arraignment or to challenge the bail determination through the appellate process, which is no remedy at all. The KCPAO blithely argues in at page 14 in their brief that "future litigants" can raise this issue on appeal.

These so-called remedies are not plain, speedy or adequate. As discussed in Pimentel's Opening Brief (*see* pages 11-13), it is not necessary for a party to demonstrate that there is absolutely no other remedy, but

instead that other remedies would not be “adequate.” *See: Riddle v. Elofson*, 193 Wn.2d 423, 434 (2019).

In *Pimentel*, once Petitioner filed the \$50,000 bail bond, his bail issue was moot. There was no incentive for his trial attorney, the undersigned, to schedule a later hearing to argue that the bond be reduced because once his father paid \$4,000 to the bail bond agent (the 8 percent bond premium), the bond premium would not have been refunded by the bail bond company, even if a court later reinstated his PR.¹⁷

In the case of an individual who could not post the increased bond, while in rare situations an appellate courts have afforded interlocutory review, once a hearing on the bond increase occurred at arraignment, any constitutional due process challenge would also have been mooted. Although a bond could be theoretically challenged interlocutorally, as was done in *State v. Barton*, 181 Wn.2d. 148 (2014), cited in both the Judges’ and KCPAO’s briefs, this is a discretionary as well as an extraordinary remedy, and cannot be considered a plain, speedy or adequate remedy because the granting of an interlocutory appeal is not only discretionary, it is also disfavored. *See Minehart v. Morning Star Boy’s Ranch*, 156 Wn.App. 457, 462 (2010).

¹⁷ Moreover, in cases such as *Pimentel* where the attorney was retained, a defendant would not choose to pay legal fees for this useless act.

State v. Barton, id., is an anomaly. In that case, the issue was the requirement that a defendant post cash bail, which the defendant challenged as a violation of Article 1 § 20 of the Washington State Constitution, a purely legal issue. The parties stipulated pursuant to RAP 2.3(b)(4) that the order should be reviewed immediately by interlocutory appellate review, an unusual situation which demonstrated that, unlike the instant case, both sides wanted the matter resolved. The Commissioner of the COA accepted review, ruling that the Court would retain the case even if the issue became mooted.¹⁸ This Court accepted transfer from the COA and eventually ruled in the defendant's favor, some two years after the trial court's ruling. That case required a great deal of effort and time and cooperation between the parties, and, in fact, can best be described as extremely unusual in our adversarial system. By contrast, in the instant matter, the Respondents are trying to evade review by this Court.

Importantly, unless a defendant's private attorney is willing to handle the matter *pro bono*, as Petitioner's counsel is doing in the instant case,¹⁹ it is very unlikely that a defendant, who could not afford to post bail in the first instance, would be willing or even able to pay attorney's fees for

¹⁸ This indicates that the defendant was either going to be able to post bail even with the cash only bail requirement, or that his case would be resolved by trial or settlement prior to an appellate court deciding the constitutional bail issue.

¹⁹ *See*: Application for Writ of Prohibition, p. 12, n. 12.

an interlocutory appeal. In cases where a public defender was appointed for the Superior Court representation of the defendant, it is unlikely that the court appointed attorney would have the resources, time or interest to attempt to raise this issue interlocutorally while the criminal case was still pending. The result would be that this important issue would escape review.

X. EVEN IF THERE WAS A PROCEDURE IN PLACE TO PERMIT A DEFENDANT WHOSE DISTRICT COURT BAIL AMOUNT (OR PR) HAD BEEN RAISED EX PARTE IN SUPERIOR COURT TO EXPEDITIOUSLY CHALLENGE THE INCREASE, THIS WOULD NOT BE AN ADEQUATE REMEDY TO CURE AN UNCONSTITUTIONAL EX PARTE BAIL INCREASE

As has been shown, *supra*, there does not exist a plain, speedy or adequate remedy by which a defendant, whose bond in the District Court was increased *ex parte* in Superior Court, exists. Even if the Judges instituted a procedure whereby a hearing could be held within a few days after an *ex parte* bond increase, this would not be adequate because a due process violation cannot be adequately remedied by a later hearing.

Where the Due Process Clause requires a hearing before a taking, providing a later hearing does not cure the due process violation. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970) (Due Process requires a hearing before public assistance benefits are discontinued and a later hearing does not cure this violation); *Conn. v. Doeht*, 501 US 1(1991); *U.S. v. James*

Daniel Good Real Property, 510 U.S. 43, 48-49 (1993); *State v. Villela*, *supra*; *Van Blaricom v. Kronenberg*, 112 Wn.App. 501, 508-509 (2002). Yet, this is what the Judges and the KCPAO suggest would constitute an adequate remedy.

XI. PETITIONER HAS PROPERLY PLED THIS MATTER AS A WRIT

A. This Court Has Held 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

The KCPAO argued at page 32 of its brief that the Court cannot convert a writ of prohibition into “a declaratory judgment action.” Yet, as demonstrated in Pimentel’s Opening Brief, this Court has on many occasions reviewed writs of prohibition, as well as other writs, and considered them as writs of mandamus or other writs, that are more applicable.²⁰

As shown on pages 21-22 of Petitioner’s Opening Brief, this Court has “exercise[d] its discretion and render[ed] a declaratory judgment to resolve a question of constitutional interpretation.” *Lee v. State*, 185 Wn.2d 608, 618 (2016). And, even where a matter before this Court “does not come before us in the form of a request for a declaratory judgment . . .

²⁰ See Petitioner’s Opening Brief, pp. 22-24.

[where] 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 Institute v. Kinnear*, 80 Wn.2d 175, 178-179 (1972).

B. This Court Has Held Many Times That if the Requisites for a Particular Writ of Prohibition are Not Met, Then it Should Exercise its Discretion and Consider it as a Petition for an Alternate Writ

This Court has on many occasions reviewed writ petitions where it has determined that the requisites for a specific writ were not met but nevertheless still considered it as an alternative writ. *State v. Superior Court of Grays Harbor Co.*, 29 Wn.2d 725, 732 (1948) (Court reviewed Writ of Prohibition as if it were a Writ of Certiorari); *Freeman v. Gregoire*, 171 Wn.2d 316, 323 (2011) (application for a Writ of Prohibition reviewed as a Writ of Mandamus).

C. Neither Respondent Addressed the *Ishikawa* and *Serko* Holdings Raised in Petitioner’s Opening Brief

As argued on pages 23-24 of Petitioner’s Opening Brief, in *Seattle Times v. Ishikawa*, 97 Wn.2d 30 (1982) and *Seattle Times v. Serko*, 170 Wn.2d 581 (2010), this Court granted original Writs of Mandamus to compel the King County Superior Court to comply with constitutional requirements,

which is what the Petitioner is requesting here.²¹ Yet, neither Respondent Judges nor KCPAO addressed these precedents in their briefing.

In *Ishikawa, supra*, this Court held that an original writ of mandamus filed directly in the Supreme Court was a proper vehicle for the third party newspapers petitioners to challenge the closure of a criminal proceeding. In granting the newspapers' writ, this Court recognized the constitutional violations with the Superior Court's broad procedure of granting *in camera* hearings, without accommodating the public's right to access. This Court granted the writ and held that while not absolute, both the Federal and Washington State constitutions recognized the right of the public to access to criminal proceeding. *Id.* at 35-36.

Further, *Ishikawa* held that the third party newspapers had standing and that it was not necessary for the defendant in the criminal action to raise this issue initially:

Petitioners rely upon both federal and state constitutional grounds to justify their right of access to this pretrial hearing. They claim no special right of access but equate their right with that of the public. We have recognized that standing. *Cohen v. Everett City Council*, 85 Wash.2d 385, 388, 535 P.2d 801 (1975).

²¹ 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*.

Id. at 35.²²

Similarly, in *State v. Serko*, 170 Wn.2d 581 (2010) this Court held that a writ of mandamus was available for newspapers to challenge a superior court's ruling that certain documents from a criminal investigation were not available under the Washington Public Records Act (PRA). Relying on its holding in *Ishikawa*, this court held that an original mandamus action was available to review the trial court's rulings and granted relief:

In keeping with our state constitution's mandate for open justice, court rules require a hearing *before* court records are sealed or redacted, and this procedure was not followed before entering the *ex parte* sealing order.

Id. at 958.

Respondents' argument that a request for future relief is not available by way of a writ of mandamus has been rejected by this Court. *See: Clark Cy. Sheriff v. Department of Social & Health Servs.*, 95 Wash.2d 445, 450 (1981). Here, Petitioner is not making a request for some undefined, amorphous relief, but instead making a specific request that this court require the Superior Court to hold hearings rather than conduct *ex parte* bail increases.²³ This satisfies the requirements of *Walker v. Munro*, 124 Wn.2d

²² Although the criminal defendant later intervened.

²³ This Court has exercised its original jurisdiction on a Writ of Mandamus where the constitutionality of a statute was at issue. *See: Dept. of Ecology v. State Finance*

402, 409-410 (1994), where this Court held that “the remedy of mandamus contemplates the necessity of indicating the precise thing to be done.”

XII. A REMEDY MUST PREVENT THE RESPONDENTS FROM AVOIDING A HEARING BY DELAYING THE *EX PARTE* REQUEST FOR AN INCREASE IN BAIL UNTIL AFTER THE CASE IS DISMISSED OFF THE DISTRICT COURT CALENDAR AT THE SECOND APPEARANCE

As explained in Petitioner’s Opening Brief at pages 24-25, if charges are not filed by the State at the second appearance, the District Court matter will be dismissed, without prejudice, which stops the running of the speedy trial clock. Nevertheless, the State often files charges days, weeks or months later involving the same matter and requests an increase in bond from what was previously set at the first appearance. If this Court grants relief in this matter, the concern is that the Respondent KCPAO could try to circumvent this holding by dismissing the case off the District Court calendar and then later filing it in Superior Court and requesting an *ex parte* bail increase, claiming that since the District Court matter was dismissed, that the “new” matter in Superior Court is not an *ex parte* application.

In *Rothgery, supra*, the magistrate at his first appearance hearing set bail at \$5,000, which he posted and was released. Six months later he was indicted by a Texas grand jury, re-arrested and there was a delay in appointing

Committee, 116 Wn.2d 246, 251-252 (1991).

him an attorney. The *Rothgery* Court explained that it had previously twice held that the right to counsel “attaches at the initial appearance before a judicial law officer. . .” *Id.* at 199. The *Rothgery* Court wrote that “the overwhelming consensus practice conforms to the rule that the first formal proceeding is the point of attachment.” *Id.* at 204.

Thus, even if charges are not filed at or before the second appearance in District Court:

Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any “critical stage” of the postattachment proceedings; what makes a stage critical is what shows the need for counsel’s presence. Thus, counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.

Id. at 212.

Rothgery therefore requires the accused be afforded counsel and a right to appear at all subsequent proceedings in the same matter, irrespective of whether the matter was temporarily dismissed for speedy trial purposes at the second appearance.

XIII. CONCLUSION

For the reasons stated, this court should grant the Writ and require the Respondents to provide notice and a hearing prior to when it seeks to raise bail.

RESPECTFULLY SUBMITTED this 5th day of October, 2020.

Allen, Hansen, Maybrown & Offenbecher, P.S.
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APPENDIX A

King County Superior Court Criminal Department Manual

Revised January 2020

Revisions to the Criminal Department Manual:

- Chief Judge approval: The Chief Criminal Judge and Chief MRJC shall determine if immediate revisions to the Criminal Department Manual are required.
- Executive Committee: The Chief Criminal Judge and Chief MRJC shall determine if revisions to the Criminal Department Manual must be brought to the Executive Committee for approval per LCR 0.7(c).

7 BOND HEARING CALENDAR

7.1 CALENDAR

Motions to address bail or other conditions of release, prior to trial or plea, are heard by the Assistant Chief Criminal Judge in Seattle or the Chief MRJC Judge in Kent. Bond Motions are scheduled as follows:

Calendar	Day of the Week	Time	Location
Seattle	Mon – Thurs	11:00	E-1201
Kent	Mon – Thurs	11:00	GA

7.2 SETTING A BOND HEARING

Counsel may schedule the motion by obtaining an available hearing date from the Chief Criminal Judge's Bailiff in Seattle, or the Criminal Department Supervisor in Kent.

Parties may note bond motions either in person or by using the following contact information:

- Seattle: 477-3720, seacriminalmotions@kingcounty.gov.
- Kent: 477-2733, kentcriminalmotions@kingcounty.gov.

The moving party shall notify opposing counsel of the date and time for the bond hearing, CrR 8.1, CR 6; CrR 8.2, CR 7. If there is no assigned prosecutor, notice shall be sent to the EPU deputies or supervisors.

Bond hearings may be set on the bond calendar as soon as possible (shorter than six days), as long as notice is given. If a party needs more time, they may ask for more time. DV or SAU hearings will still require six days' notice. The Court will strike hearings where there is no notice.

For proper identification of an inmate, the following information is needed to note a bond hearing:

- The name of the defendant
- The defense attorney's name
- The CCN (Computer Control Number)
- The charges
- Date of arraignment
- Trial date
- Current bail amount

PROOF OF SERVICE

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

On the 5th day of October, 2020, I filed the above Petitioner's Reply Brief via the Appellate Court E-File Portal through which counsel for Respondents and Amicus WAPA will be served.

This document will also be e-mailed to Petitioner.

DATED at Seattle, Washington this 5th day of October, 2020.

/s/ Sarah Conger
Sarah Conger, Legal Assistant
OID #91110

ALLEN, HANSEN, MAYBROWN, OFFENBECHER

October 05, 2020 - 2:31 PM

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