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STATE OF WASHINGTON
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No. 98154-0

SUPREME COURT OF THE STATE OF WASHINGTON

JULIAN PIMENTEL,

Petitioner,

v.

THE JUDGES OF KING COUNTY SUPERIOR COURT, et al.,

Respondents.

BRIEF OF RESPONDENT DAN SATTERBERG

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I. ISSUES PRESENTED.

1. Whether the writ of prohibition should be denied where petitioner has no standing to challenge the bail practice at issue.
2. Whether the writ of prohibition should be denied where this Court has no power to issue a writ of prohibition against the superior court except as an exercise of its appellate or revisory jurisdiction, which cannot apply in this case because there was no underlying pending case at the time the writ was requested.
3. Whether the writ of prohibition should be denied where petitioner has failed to show that the superior court lacked jurisdiction.
4. Whether the writ of prohibition should be denied where petitioner has failed to show the absence of an adequate remedy in the course of legal proceedings.
5. Whether the writ of prohibition should be denied where petitioner has failed to show that the bail practice that he is challenging is unconstitutional.
6. Whether the writ of prohibition should be denied where the bail practice at issue does not violate the Rules of Professional Conduct or Code of Judicial Conduct because it is authorized by the Criminal Rules.
7. Whether this Court should avoid the constitutional question of whether county prosecuting attorneys are state officers for purposes of Article

IV, § 4 of the Washington Constitution because it is not necessary to deny or grant the writ of prohibition in this case.

8. Whether county prosecuting attorneys are state officers for purposes of Article IV, § 4 of the Washington Constitution.
9. Whether Pimentel's request for a declaratory judgment should be rejected because this Court has no jurisdiction to grant a declaratory judgment in an original action in this Court.

II. STATEMENT OF THE CASE.

In March of 2018, fifteen-year-old A.R.W. reported to Federal Way Police Officer Wong that Julian Pimentel had sexually assaulted her while she was so intoxicated that she was unable to consent. Agreed Record ("AR") 18. A child forensic interview was conducted. AR 18. Federal Way Detective Adams conducted further investigation and took recorded statements from three additional witnesses. AR 18-20.

After completing his investigation Detective Adams signed a "Statement of Probable Cause" on a document called a "Superform," which very briefly set forth the allegation that Pimentel had sexual intercourse with A.R.W. while she was unable to consent. AR 12. On the form, Detective

Adams indicated that he was requesting that the charges be “rush-filed” within 72 hours but he did not object to release of Pimentel. AR 12.¹

Pimentel turned himself in and was placed under arrest. AR 6. The Superform was filed with the King County District Court. AR 11-12.

At Pimentel’s “first appearance” hearing in district court, which was triggered by his warrantless arrest, the State requested that the district court find probable cause for the crime of rape in the second degree. AR 3. The district court noted that it had read “the Affidavit of Probable Cause,” and made the finding of probable cause. AR 3. The State requested bail in the amount of \$150,000. AR 4. The district court released Pimentel on personal recognizance, while also concluding that “the State’s recommendation for bond is not unreasonable.” AR 8. The district court noted “I’m not sure what the Superior Court will do.” AR 9. The district court also suggested a GPS monitoring device but that “it wouldn’t make much sense for me to order it now because with a return date of tomorrow, that’s not going to be installed that fast anyway.” AR 9. The district court requested that the prosecutor “pass that along to your office.” AR 9.

¹There are two boxes on the form to check regarding “rush” filing. Although one box was checked “no,” the other was marked as follows:  AR 12.

The next day, the State filed an Information in superior court charging Pimentel with assault in the second degree with a sexual motivation allegation. AR 16. The Information was supported by a four-page Certification for Determination of Probable Cause that detailed Detective Adams' investigation, including the statements of other witnesses. AR 18-21.

The prosecutor also submitted a "Prosecuting Attorney's Case Summary and Request for Bail and/or Conditions of Release." AR 17. The Information and Case Summary were signed by a different deputy prosecutor than the one who represented the State at the first appearance in district court. AR 3, 17. In the Case Summary, the deputy prosecutor correctly noted that the State had requested \$150,000 bail at first appearance, and that the district court had released Pimentel on his personal recognizance. AR 17.² The deputy prosecutor also noted, correctly, that the district court was not informed that the detective had obtained recorded statements from three witnesses that corroborated A.R.W.'s account. AR 12, 17.³ The State requested bail in the amount of \$50,000. AR 17.

² Pimentel faults the State for not providing a transcript of the first appearance the previous day. No such requirement exists, nor would it be feasible.

³ While the Superform contained the information that friends of Pimentel and A.R.W. were present before and after the alleged assault, there were no details regarding whether those friends had been contacted by the detective or what they had reported. AR 12.

Without a hearing the superior court made a finding of probable cause, authorized the filing of the Information and fixed bail in the amount of \$50,000. AR 23-26.

Nine months later, in January of 2019, the State dismissed the charge against Pimentel in the interest of justice. AR 36-37.

More than a year after the charge was dismissed, Pimentel filed this application for writ of prohibition from this Court seeking to prohibit the King County Superior Court in future cases from setting a different bail amount after a pre-charging first appearance in district court without an adversarial hearing where the defendant has the assistance of counsel.

III. ARGUMENT.

A. Pimentel Lacks Standing To Seek This Writ Of Prohibition Because He Is Not “Beneficially Interested” In The Outcome.

The charge against Pimentel was dismissed long before he filed this original action for a writ of prohibition. A person challenging a government action by means of a writ must be adversely affected by that action at the time the action is filed. *Blomstrom v. Tripp*, 189 Wn.2d 379, 391, 402 P.3d 831 (2017) (petitioner had no standing to challenge constitutionality of ignition interlock device through writ of review where order imposing the device had been revoked before action was filed); *State v. Tallman*, 38 Wash. 132, 133, 80 P. 272 (1905) (no standing to seek writ of prohibition

unless substantial rights of petitioner are affected). Unless the petitioner is affected by the challenged action, this Court cannot provide him effective relief. *Blomstrom*, 189 Wn.2d at 391. The extraordinary remedy of a writ of mandamus or prohibition requires that a petitioner be “beneficially interested.” *Colvin, et al. v. Inslee, et al.*, ___ Wn.2d ___, 467 P.3d 953 (2020); *State ex rel. N.Y. Cas. Co. v. Superior Court for King County*, 31 Wn.2d 834, 838, 199 P.2d 581 (1948). Pimentel has no standing, and is not beneficially interested, because at the time he sought the writ he was no longer affected by the challenged practice. The charges against him had been dismissed more than a year earlier. While this Court sometimes considers issues that become moot during the pendency of the case, the issue presented here was moot long before Pimentel sought this writ. *Blomstrom*, 189 Wn.2d at 392. *See also Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984) (court may review issues which became moot after a hearing on the merits of the claim). Adhering to this standing requirement is important. It avoids the danger of allowing petitioners to litigate a claim in which they have no existing interest. *Id.* This Court should deny the writ of prohibition in this case because Pimentel lacks standing.

B. Article IV, § 4 Does Not Give This Court Original Jurisdiction To Issue A Writ Of Prohibition Against A State Officer.

Article IV, § 4 of the Washington Constitution grants this Court the power to issue several enumerated writs against state officers. It reads in relevant part:

The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings. . .

Wash. Const. art. IV, § 4. While the first sentence explicitly grants this Court the power to issue writs of habeas corpus, quo warranto and mandamus as to state officers, it does not grant the power to issue a “writ of prohibition” against a state officer. The power to issue a writ of prohibition is limited to the exercise of this Court’s appellate and revisory jurisdiction, enumerated in the same constitutional provision as follows:

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.*

Id. (emphasis added).

In construing the state constitution, this Court utilizes the well-recognized rule of construction contained in the maxim, “*expressio unius est exclusio alterius*,” which translates generally to the “the expression of one thing in the Constitution may necessarily involve the exclusion of other things not expressed.” *State v. Clausen*, 142 Wash. 450, 453, 253 P. 805

(1927). Article IV, § 4 only grants this Court the power to issue writs of habeas corpus, quo warranto and mandamus as to state officers. This Court's power to issue a writ of *prohibition* to the superior court is limited to this Court's exercise of its appellate and revisory jurisdiction.

C. This Court Does Not Have Appellate Or Revisory Jurisdiction Under Article IV, § 4 When There Is No Underlying Pending Case.

Pimentel argues this Court can issue a writ in this case in the “exercise of its appellate and revisory jurisdiction.” Wash. Const. art. IV, § 4. He is mistaken. The exercise of appellate or revisory jurisdiction can only occur when there is a pending case underlying the petition to this Court. The criminal charge against Pimentel is no longer pending and was dismissed long before he sought a writ from this Court. As such, Pimentel could not seek an appeal. RAP 3.1 provides that only an “aggrieved party” may seek appellate review. At the time that Pimentel filed this original action, he was no longer an aggrieved party, since the charge against him had been dismissed. *State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605 (2003) (appellant was not an aggrieved party after the criminal charges against him had been dismissed). Thus, a writ of prohibition to the superior court would not be an exercise of this Court's appellate or revisory jurisdiction.

The two cases cited by Pimentel do not support his argument that this Court can exercise constitutional appellate or revisory jurisdiction in a case that is final and no longer pending. In *State ex rel. Amsterdamsch v. Superior Court*, 15 Wash. 668, 47 P. 31 (1896), this Court granted a writ of prohibition to the superior court to direct that court's actions in a pending case. In that case, the Spokane County prosecuting attorney had charged Amsterdamsch with operating as a corporation without proper incorporation. The superior court appointed a receiver to take possession of Amsterdamsch's property. *Id.* at 669. Amsterdamsch sought a writ of prohibition from this Court directing the superior court to "desist and refrain from any further proceedings in the matter of the appointment of said receiver." *Id.* at 670. This Court agreed that the superior court had no power to appoint a receiver before trial and judgment. *Id.* at 676. There can be no question that the case was still pending in superior court when this Court issued the writ. This Court explained its decision as follows: "The *statute* provides that the writ of prohibition is issued on the application of the person beneficially interested, and it seems plain to us that the relator, whether it is a de jure or only a de facto corporation, is sufficiently interested to be entitled to the possession of its property until deprived of it by a proper proceeding in a court of competent jurisdiction." *Id.* at 678, 675 (citing

Laws 1895, §§ 29, 30 which provided for a statutory writ of prohibition by “any court”).

Likewise, in *State ex rel. Murphy v. Taylor*, 101 Wash. 148, 149, 172 P. 217 (1918), Murphy sought a writ of prohibition against the Yakima County Superior Court after the court issued a warrant for his arrest upon a citizen’s complaint for a gross misdemeanor. This Court concluded that the superior court acted outside its jurisdiction and granted the writ of prohibition. *Id.* at 157. As this Court’s opinion was pronounced just two months after the warrant was issued, there can be little doubt that the underlying misdemeanor prosecution was still pending.

As explained by this Court in *State ex. rel. Nooksack River Boom Co. v. Superior Court of Whatcom County*, 2 Wash. 9, 14, 25 P. 1007 (1891), the issuance of a writ of prohibition from this Court to a lower court requires not just that the lower court be acting outside its jurisdiction, but also “that there is still something which the inferior court is about to do under its claim of jurisdiction.” This condition could only be met if there was a case still pending below. This Court cannot issue a writ of prohibition to the superior court as an exercise of its appellate or revisory jurisdiction when the underlying case is no longer pending in the superior court (or any court for that matter) when the writ was sought.

In sum, the state constitution does not grant this Court the power to grant a writ of prohibition against a state officer in an original action except in this Court's exercise of its appellate or revisory jurisdiction, which has no application here. As such, this Court lacks subject matter jurisdiction over Pimentel's request for a writ of prohibition. *Marley v. Dept. of Labor and Industries*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (subject matter jurisdiction is the authority to decide the type of controversy involved in the action).

D. This Court Does Not Have Appellate Or Revisory Jurisdiction Under Article IV, § 4 Over The Non-Judicial, Executive Actions.

This Court also has no subject matter jurisdiction to issue a writ of prohibition in the exercise of its appellate and revisory power as to a prosecuting attorney acting as an executive officer. As this Court held more than a century ago, the constitutional writ of prohibition can only be invoked against courts, boards or persons who are exercising unauthorized judicial or quasi-judicial power. *Winsor v. Bridges*, 24 Wash. 540, 542-43, 64 P. 780 (1901) (constitutional writ of prohibition may only arrest judicial action in proceedings in excess of jurisdiction). It cannot be invoked to prohibit executive actions. *Id.*

A prosecutor's bail recommendation is an executive action and is not judicial or quasi-judicial in nature. *State v. Finch*, 137 Wn.2d 792, 809,

975 P.2d 967 (1999) (appearance of fairness doctrine has no application to prosecutor’s charging decisions because they are executive and not judicial or quasi-judicial in nature). For this reason, this Court lacks subject matter jurisdiction to issue writs of prohibition against prosecutors exercising their executive functions. *Marley*, 125 Wn.2d at 539 (a court lacks subject matter jurisdiction when it lacks the power to decide a “type of controversy”).

E. The Writ Of Prohibition Cannot Issue Because There Is No Showing Of An Absence Or Excess Of Jurisdiction.

Even assuming that Article IV, § 4 gave this Court the power to issue a writ of prohibition to a state officer outside the exercise of its appellate and revisory jurisdiction, Pimentel has not met the stringent requirements for such a writ to issue. A writ of prohibition is an extraordinary remedy. *Riddle v. Elofson*, 193 Wn.2d 423, 429, 439 P.3d 647 (2019). The writ is a “drastic measure,” which can be issued only when two conditions are met: (1) an absence or excess of jurisdiction, and (2) absence of a plain, speedy and adequate remedy in the court of legal procedure. *Skagit County Public Hosp. Dist. No. 304 v. Skagit County Public Hosp. Dist. No. 1*, 177 Wn.2d 718, 722-23, 305 P.3d 1079 (2013). A writ of prohibition issues to arrest execution of a future act, not to undo an action already performed. *Riddle*, 193 Wn.2d at 429. The writ will not issue simply to prevent error, to take the place of an appeal, or to serve as a writ of review for correction of an error. *Id.*

In this case, the writ could only be granted if Pimentel made a showing that the King County Superior Court had exceeded its jurisdiction by issuing a warrant and setting a bail amount in his case. *Id.* at 430. Pimentel has not attempted to make this showing.

There is no plausible argument that the superior court lacked either personal or subject matter jurisdiction to issue a warrant and make a bail determination when the felony charge against Pimentel was filed. Article IV, § 6 of the state constitution gives the superior court jurisdiction over all felony criminal cases. Wash. Const. art. IV, § 6.

While Pimentel argues that the superior court should not be allowed to increase bail without a hearing, he concedes that the superior court had the power to set bail at the same amount as the district court, or to increase bail if the defendant had violated the conditions of release, or to increase bail if a hearing were held with defense counsel present. These concessions demonstrate that the superior court has jurisdiction over the felony case and any bail determinations. *State v. Posey*, 174 Wn.2d 131, 141, 272 P.3d 840 (2012) (superior court has original constitutional jurisdiction in all felony cases); *State v. Barnes*, 146 Wn.2d 74, 81, 43 P.3d 490 (2002) (superior court acquires jurisdiction with the filing of an information). A procedural error does not deprive a court of jurisdiction. *Marley*, 125 Wn.2d at 539 (stating “If the type of controversy is within the subject matter jurisdiction,

then all other defects or errors go to something other than subject matter jurisdiction.”). For this reason alone, the writ of prohibition should not issue.

Similarly, Pimentel has made no plausible argument that the prosecutor exceeded his “jurisdiction” when the deputy prosecutor argued for bail.

This rule—that a writ of prohibition will not issue unless there is a lack of jurisdiction—dates back to this Court’s earliest cases and has been consistently applied by this Court. The writ of prohibition must be denied in this case because Pimentel has failed to show an absence or excess of jurisdiction.

F. The Writ Of Prohibition Cannot Issue Because This Issue Can Be Raised By Future Litigants On Appeal, Which Provides An Adequate Legal Remedy.

The writ of prohibition is to be used with “great caution and forbearance.” *Riddle*, 193 Wn.2d at 429 (quoting James L. High, *Extraordinary Legal Remedies*, 709 (3d ed. 1896)). A writ will not issue if there is an adequate remedy that exists. *Riddle*, 193 Wn.2d at 433. A remedy is not inadequate merely because it is attended with delay, expense, annoyance, or even some hardship. *Id.* at 434. What constitutes an adequate alternative legal remedy depends on the facts of each particular case. *Id.* The writ of prohibition is not to be used to take the place of an appeal. *Id.*

at 429. Where direct or discretionary review is available from a trial court decision, a writ of prohibition generally may not be used to review that decision. *Kreidler v. Eikenberry*, 111 Wn.2d 828, 840, 766 P.2d 438 (1989). More specifically in regard to criminal cases, in *State ex rel. Heidal v. Breseman*, 42 Wn.2d 674, 675, 257 P.2d 637 (1953), this Court denied the writ of prohibition, holding that “the writ of prohibition does not lie in a criminal case because there is a plain, speedy and adequate remedy by appeal.”

This Court has long adhered to this requirement. Most recently, in *Riddle*, this Court denied the writ of prohibition because Riddle could have sought a preliminary injunction and declaratory judgment, which would have provided an adequate remedy. *Riddle*, 193 Wn.2d at 435.

Pimentel argues that the writ should be granted because it is the only effective means to address the issue in *future* cases. He ignores the fact that there is an adequate remedy at law for those cases. Pimentel seeks a prohibition on a practice that will apply only to future cases unrelated to his dismissed charge. But for purposes of these future cases, an interlocutory or direct appeal is an available and adequate remedy at law. Many bail issues have been raised and determined on their merits through the regular appeals process. *State v. Barton*, 181 Wn.2d 148, 168, 331 P.3d 50 (2014) (interlocutory appeal holding that order requiring cash bail violated the state

constitution); *State v. Ingram*, 9 Wn. App. 2d 482, 490, 447 P.3d 192 (2019) (reviewing technically moot bail issue because issue was of continuing and substantial public interest); *State v. Huckins*, 5 Wn. App. 2d 457, 464, 426 P.3d 797 (2018) (reviewing technically moot bail issue because issue presented a matter of continuing and substantial public interest); *City of Yakima v. Mollett*, 115 Wn. App. 604, 607, 63 P.3d 177 (2003) (reviewing technically moot bail issue because “the proper form of bail is a matter of continuing and substantial public interest”); *Westerman v. Cary*, 125 Wn.2d 277, 892 P.2d 1067 (1994) (reviewing Spokane County general order making domestic violence offenders ineligible for release on bail pending first appearance); *State v. Reese*, 15 Wn. App. 619, 620, 550 P.2d 1179 (1976) (reviewing bail issue and finding no error in refusal to reduce pretrial bail). The normal appellate process provides an adequate remedy for criminal defendants who wish to challenge the practice at issue here in future cases. Notably, although Pimentel complains that the process at issue has been in place for decades, he can cite to no case where a defendant has attempted to raise the constitutional challenge presented here in a direct appeal or interlocutory appeal. The fact that defendants in King County have not availed themselves of the appellate process is not a sufficient reason to disregard this Court’s clear and long-standing precedent.

Holding that an original action against the superior court can be brought in this Court anytime a criminal defendant perceives a constitutional error in a criminal case would have enormous consequences for this Court and for criminal cases. It would also obliterate the requirements to obtain the “extraordinary remedy” of a writ of prohibition that this Court has adhered to since at least 1907. *Riddle*, 193 Wn.2d at 429; *State v. Superior Court of Mason Cty.*, 47 Wash. 154, 155-56, 91 P. 639 (1907) (writ denied because petitioner had "an adequate remedy by appeal").

G. The Determination Of Probable Cause For The Filing Of Criminal Charges And The Issuance Of An Arrest Warrant Does Not Require An Adversarial Hearing.

Pimentel argues that King County’s long-standing practice violates the right to counsel when a bail increase occurs without an adversarial hearing when felony charges are filed. However, the United States Supreme Court has never held that a bail determination alone is a critical stage of the proceedings that requires an adversarial hearing and the assistance of counsel. To the contrary, the Court has held that a judicial determination of probable cause and issuance of an arrest warrant does not require an adversarial hearing. This preliminary determination by the superior court bears none of the hallmarks of a critical stage at which the assistance of counsel is required.

Under the Superior Court Criminal Rules, when the State files a felony information, the superior court has authority to issue a summons or an arrest warrant upon finding probable cause to support the charge. CrR 2.2(a)(1) and (2). If the superior court issues a warrant, it must set a bail amount. CrR 2.2(c)⁴ The criminal rules do not require an adversarial hearing for this determination.

This procedure is constitutional because the United States Supreme Court long ago held that a judicial finding of probable cause and issuance of an arrest warrant does not require an adversarial hearing. In *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), the Court held that a judicial determination of probable cause is necessary to authorize pretrial detention when criminal charges are filed, but an adversarial hearing is not. In *Gerstein*, Florida prisoners brought a class action suit claiming they were entitled to a hearing on the issue of probable cause for pretrial detention. *Id.* at 105-06. The Court held that a judicial determination of probable cause was necessary, but that the probable cause determination

⁴ The first appearance hearing in Pimentel's case occurred in King County District Court because he was arrested prior to the filing of any charges. If a suspect is arrested without a warrant prior to the filing of charges, a judicial determination of probable cause can be made by a district court but no later than 48 hours following the arrest pursuant to CrRLJ 3.2.1(a). This district court determination of probable cause only occurs if an arrest occurs before State has filed any felony charges in superior court. CrRLJ 3.2.1(g); *State v. Jefferson*, 79 Wn.2d 345, 350, 485 P.2d 77 (1971).

was not a critical stage requiring counsel: "These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing." *Id.* at 120. Significantly, in deciding that a judicial determination of probable cause was required, the Court characterized the stakes of such a determination as "high," noting "[p]retrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty." *Id.* at 114 (citations omitted). Nonetheless, the Court declined to require an adversarial hearing. As a result, a 2017 study focusing of state criminal codes revealed that in thirty-two states counsel for indigent defendants is not physically present at the initial appearance when bail is set. 4 W. LaFave, J. Israel, N. King and O. Kerr, *Criminal Procedure*, § 12.1(c) (2020).

Gerstein controls the issue presented here. An adversarial hearing is not required when the superior court determines there is probable cause to support a felony charge and authorizes pretrial detention by issuing an arrest warrant.

Pimentel’s reliance on *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008), is misplaced. *Rothgery* did not overrule *Gerstein*. The Court did not hold that Rothgery was entitled to counsel at the magistrate hearing that functioned as his first appearance in Texas. Instead, the Court held that the magistrate hearing marked the point at which the state had an obligation “to appoint counsel within a reasonable time.” *Id.* at 198. *Rothgery* thus did not hold that the magistrate hearing was itself a critical stage at which the assistance of counsel is required. Significantly, in surveying the practice across jurisdictions the Court noted that 43 States “take the first step toward appointing counsel ‘before, at, or just after initial appearance.’” *Id.* at 204 (emphasis added). The Court noted that the question it addressed—whether the hearing signaled the initiation of adversary judicial proceedings—was distinct from whether the hearing was itself a critical stage. *Id.* at 212. Because bail was determined at the magistrate hearing at issue in *Rothgery*, and because the Court did not hold that counsel is required at the magistrate hearing but only within a reasonable time after the hearing, *Rothgery* does not support the conclusion that a bail determination is a critical stage of the proceedings.

Pimentel’s reliance on *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970), is similarly misplaced. At issue in that case was a “preliminary hearing” during which testimony by witnesses was

presented. *Id.* at 9. The Court held that a lawyer's skilled cross-examination of witnesses could expose fatal weaknesses in the case that could affect the magistrate's decision or could provide vital impeachment evidence or preserve helpful evidence for trial. *Id.* The fact that the preliminary hearing involved the testimony of witnesses was central to the Court's holding that it was a critical stage of the proceedings. Because the determination of probable cause in Washington does not involve witness testimony, *Coleman* does not support Pimentel's argument.

When the superior court finds probable cause and issues either a summons or an arrest warrant *Gerstein* holds that an adversarial hearing is not constitutionally required. Pursuant to *Gerstein*, the determination of probable cause and issuance of a warrant is not a critical stage that requires an adversarial hearing.

Even if *Gerstein* was not controlling, the finding of probable cause and issuance of a summons or arrest warrant does not meet the various tests for what constitutes a critical stage. The Ninth Circuit has developed a three-factor test for determining whether a stage is critical. Any one of the following three factors may be sufficient to make a particular proceeding a critical stage: (1) failure to pursue strategies or remedies results in a loss of significant rights; (2) skilled counsel would be useful in helping the accused understand the legal confrontation; and (3) the proceeding tests the merits

of the accused's case. *Menefield v. Borg*, 881 F.2d 696, 698-99 (9th Cir. 1989) (right to counsel at time of new trial hearing); *United States v. Benford*, 574 F.3d 1228, 1232 (9th Cir. 2009) (pretrial status conference not a critical stage where there is the absence of all three factors); *McNeal v. Adams*, 623 F.3d 1283, 1289 (2010) (hearing on motion to compel DNA sample not a critical stage where there is an absence of the three factors). None of these factors are met by the superior court's determination of probable cause and issuance of an arrest warrant. The defendant does not lose the opportunity to assert any rights. The bail determination is not permanent and can be challenged within days. CrR 3.2(j) (allowing accused to move for reconsideration of bail and requiring hearing within a reasonable time). The defendant is not present and thus there is no legal confrontation to which the defendant is subjected without the aid of counsel. And finally, the issuance of an arrest warrant does not test the merits of the accused's case. Under the Ninth Circuit test, the determination of probable cause and issuance of an arrest warrant is not a critical stage that requires an adversarial hearing with counsel present.

Washington courts have followed federal law as to what constitutes a critical stage. In *State v. Heddrick*, 166 Wn.2d 898, 911, 215 P.3d 201 (2009), the court defined a critical stage as one "in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in

which the outcome of the case is otherwise substantially affected.” (quoting *State v. Agtuca*, 12 Wn. App. 402, 404, 529 P.2d 1159 (1974)). The procedure challenged in this case does not meet this definition. The determination of probable cause and issuance of an arrest warrant is not a critical stage that requires an adversarial hearing and assistance of counsel.

Finally, the rule that Pimentel urges this Court to adopt would have wide-ranging impacts that Pimentel fails to address, but this Court must consider. In Pimentel’s case the charges were “rush filed” the day after the preliminary appearance in district court. But in many cases charges are not immediately filed after a warrantless arrest. The prosecutor may request additional investigation before filing charges. In those cases, the suspect will be released from confinement and freed from any conditions of release imposed by the district court. Further investigation may uncover evidence of additional crimes. The rule Pimentel advocates would prohibit the superior court from issuing an arrest warrant when charges are filed months after a preliminary appearance in district court, even if additional crimes have been uncovered and are charged. In addition, the rule he advocates would prohibit the superior court from *reducing* bail upon the filing of charges, in that the analysis of what constitutes a critical stage of the proceedings is determined by the nature of the proceeding, not the outcome. And while Pimentel asserts that an arrest warrant can issue without an

adversarial hearing when there is a “claim that the Petitioner violated his conditions of release,” he fails to explain why. Brief of Petitioner, at 1.

This Court should refrain from issuing a writ of prohibition because the record presented is inadequate for this Court to fully consider and address these issues. *See Walker v. Munro*, 124 Wn.2d 402, 422, 879 P.2d 920 (1994) (writ of mandamus denied because record was inadequate to fashion a remedy). Utilization of the normal rule-making process would be preferable, as it would enable all interested and affected parties to participate, thus avoiding unforeseen and unintended consequences. *See In re PRP of Carlstad*, 150 Wn.2d 583, 592 n. 4, 80 P.3d 587 (2003) (declining to adopt the “mailbox rule” through case law).⁵

H. The Challenged Procedure Does Not Violate The RPCs Or CJC.

Pimentel argues that the superior court’s determination of probable cause and issuance of an arrest warrant violates both the Rules of Professional Conduct and the Code of Judicial Conduct. Pimentel is incorrect because the procedure followed is authorized by the Criminal Rules.

⁵ Pimentel provides no argument to support his claim that the procedure at issue violates the Fifth Amendment or due process, and thus those constitutional provisions are not addressed herein. *Sprague v. Spokane Valley Fire Department*, 189 Wn.2d 858, 876, 409 P.3d 160 (2018).

Like statutes, court rules must be harmonized. *State v. George*, 160 Wn.2d 727, 735, 158 P.3d 1169 (2007). RPC 3.5 prohibits *ex parte* communication with a judge “unless authorized to do so by law.” RPC 3.5(b). “*Ex parte*” is undefined. *Id.* The Superior Court Criminal Rules provide legal authorization for specific *ex parte* communications. For example, CrR 3.1(f)(2) allows an appointed lawyer to seek funding for expert services *ex parte*. CrR 2.3 authorizes issuance of a search warrant without a hearing. CrR 3.2(l)(1) allows the court to issue an arrest warrant based on a violation of the conditions of release without a hearing. Likewise, CrR 2.2(a)(1) and (2) authorize the determination of probable cause and issuance of an arrest warrant to be conducted without a hearing. Because the procedure at issue is authorized by the CrR 2.2, it does not violate RPC 3.5. Similarly, pursuant to CJC 2.9(A)(5) *ex parte* communications are permitted when expressly authorized by law.

Moreover, the remedy for a claimed violation of the RPCs or CJC is a request for discipline by the bar association or the Commission on Judicial Conduct, not an extraordinary writ. *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991); RPC Preamble and Scope [19] and [20]; CJC Preamble and Scope [3] and [7].

I. This Court Should Avoid The Constitutional Question Of Whether A County Prosecuting Attorney Is A State Officer For Purposes Of Article IV, § 4.

This Court has original jurisdiction in prohibition actions against “state officers” only. Wash. Const. art. IV, § 4; RAP 16.2(a). A superior court judge is a state officer for purposes of original actions. *Riddle*, 193 Wn.2d at 428; *State ex rel. Edelstein v. Foley*, 6 Wn.2d 444, 448, 107 P.2d 901 (1940). However, this Court has never addressed whether a county prosecuting attorney is a state officer.

If this Court were to hold that Pimentel has failed to meet the requirements of a writ of prohibition, this Court need not reach the question of whether a county prosecuting attorney is a state officer. On the other hand, if this Court were to hold that Pimentel is entitled to a writ of prohibition, that writ would be directed to the superior court to end the practice. A writ of prohibition directed to the superior court would provide the remedy that Pimentel seeks without this Court reaching the issue of whether a county prosecuting attorney is a state officer for purposes of Article IV, § 4. This Court generally avoids deciding constitutional questions when a case may be fairly resolved on other grounds. *Community Telecable of Seattle, Inc. v. City of Seattle, Dept. of Executive Admin.*, 164 Wn.2d 35, 41, 186 P.3d 1032 (2008). *See also State v. McEnroe*, 179 Wn.2d 32, 35, 309 P.3d 428 (2013). This Court need not decide whether a

prosecuting attorney is a state officer as contemplated in Article IV, § 4 because the writ of prohibition can be denied or granted without reaching that constitutional question.

J. Prosecuting Attorneys Are Not State Officers For Purposes Of Article IV, § 4.

Cases regarding the constitutional writ of prohibition go as far back as 1891. *See State ex. rel. Schloss et al. v. Superior Court of Jefferson County*, 3 Wash. 696, 29 P. 202 (1892). Yet Pimentel has cited to no case where this Court has issued a constitutional writ of prohibition against a prosecuting attorney.

Article IV, § 4 defines the jurisdiction of this Court. It provides, in relevant part, that “The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers. . . .” Wash. Const. art IV, § 4. The original jurisdiction is thus limited to these enumerated writs directed to state officers.

In *State ex. rel. Hollenbeck v. Carr*, 43 Wn.2d 632, 638, 262 P.2d 966 (1953), this Court concluded that it did not have original jurisdiction to issue a writ of mandamus to Mason County commissioners because they were not state officers. This Court noted that although county commissioners “serve in a dual capacity and are state officers for certain purposes” they were not controlled by the state and were not regarded as agents of the state department of social security. *Id.* at 635-37.

In *State ex. rel. Stearns v. Smith*, 6 Wash. 496, 33 P. 974 (1893), this Court held that it could not issue a writ of mandamus against the ex-treasurer of the board of regents of the Agricultural College. Analyzing Article IV, § 4, this Court held that original jurisdiction as to state officers applied only to “the executive and the judiciary” and was limited to state officers that are subject to removal by impeachment pursuant to Article V, § 2. Wash. Const. art. V, § 2.

This Court’s conclusion that superior court judges are state officers within the meaning of Article IV, § 4 in *State ex. rel. Edelstein v. Foley*, *supra*, 6 Wn.2d at 448-49, cannot be extended to prosecuting attorneys because the reasoning behind that conclusion does not apply to prosecuting attorneys. In that case, the governor had appointed Ralph Foley to fill a superior court vacancy that occurred when an elected judge retired. *Id.* at 445. Samuel Edelstein was elected to the same superior court position in the general election months later. *Id.* Foley refused to relinquish the office to Edelstein and Edelstein filed an original action with this Court. *Id.* Foley challenged this Court’s original jurisdiction in the matter, arguing that he was not a state officer. *Id.* This Court concluded that superior court judges are state officers by relying on *State ex rel. Dyer v. Twichell*, 4 Wash. 715, 31 P. 19 (1892), which held that under Article VI, § 8 of the state constitution superior court judges were to be elected with other state officers

in 1892 and every fourth year thereafter. *Edelstein*, 6 Wn.2d at 449; Wash. Const. art. VI, § 8. This Court also noted that the constitution required that the state pay half of the superior court judge salaries and that vacancies occurring in the office are filled by the governor. *Edelstein*, 6 Wn.2d at 449; Wash. Const. art. IV, § 5 and § 13.

In contrast, prosecuting attorneys are governed by the provisions of Article XI of the state constitution, relating to “County, City and Township Organization.” In Article XI, § 5 of the constitution directs the legislature to provide for the election of prosecuting attorneys and other county officials. Wash. Const. art. XI, § 5. Thus, prosecutors are elected along with other county officers on a different election cycle than superior court judges and state executive officers.⁶ Unlike superior courts, vacancies for prosecuting attorney are not filled by the governor. In *State ex rel. McMartin v. Whitney*, 9 Wash. 377, 37 P. 473 (1894), this Court held that the governor does not have the power to fill a vacancy in the office of prosecuting attorney because prosecuting attorneys are county officers pursuant to Article XI, § 6. Wash. Const. art. XI, § 6.

⁶ For example, elections for governor and other state officers, including superior court judges, are being held this November.
<https://www.sos.wa.gov/elections/candidates/offices-open-for-election.aspx>
Prosecuting attorneys and other county officers were elected in 2018.
<https://results.vote.wa.gov/results/20181106/Turnout.html>

Prosecuting attorneys differ from superior court judges under the state constitution in how they can be removed as well. Prosecuting attorneys are subject to removal from office under Article IV, § 9, not impeachment under Article V, § 2.⁷ Wash. Const. art. IV, § 9; Wash. Const. art. V, § 2.

Instead of finding support for his argument in the constitution, Pimentel attempts to rely on a 2008 legislative finding. In amending RCW 36.17.020, providing that both the state and the county contribute to the salary of prosecuting attorneys, the legislature made a finding 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 a civil counsel for the county” and that the “dual role” is reflected in various provisions of the state constitution. Laws of 2008, ch. 309, § 1. However, that legislative finding cannot change the meaning of Article IV, § 4. *See Spokane County v. Washington*, ___ Wn.2d ___, ___ P.3d ___ (slip opinion No. 97739-9, issued Aug. 20, 2020) (in interpreting state constitution this Court looks to the meaning of the words used at the time the constitution was drafted). It is this Court, not the

⁷ Superior court judges, as courts of record, can be impeached pursuant to the plain language of Article V, § 2. *See State v. Superior Court of Pierce County*, 92 Wash. 375, 159 P. 84 (1916) (removal of superior court judges by impeachment).

legislature, that is tasked with interpreting the state constitution. This Court is not bound by the legislative finding.

Similarly, Pimentel's reliance on *Whatcom County v. State*, 99 Wn. App. 237, 993 P.2d 273 (2000), is misplaced because that case involved statutory interpretation, not the constitutional provision at issue here. Whatcom County and its elected prosecutor sought a declaratory judgment that the Attorney General was required to defend and indemnify the prosecutor in a civil rights suit. The issue was whether a deputy prosecuting attorney was a state officer for purposes of RCW 4.92.060, .070, .075 and .130. *Id.* at 250. That decision was based on an interpretation of those statutes, and did not analyze or even cite Article IV, § 4 of the state constitution. It is not controlling on the question of whether prosecuting attorneys are state officers for purposes of Article IV, § 4.

In sum, the relevant provisions of the state constitution show that prosecuting attorneys were considered county officers, not state officers, by the drafters. As such, Article IV, § 4, does not give this Court original jurisdiction to issue a writ against a prosecuting attorney.

If prosecuting attorneys are state officers simply because they participate in the enforcement of state laws, then sheriffs and police officers are state officers as well. Indeed, by that reasoning, a whole host of lower governmental agencies that help enforce state laws would become state

officers, allowing original actions against them to be filed in this Court. This Court has previously explained the limited scope of the extraordinary writs as to state officers:

The purpose of the constitution in setting up a supreme court was to provide a court for appeals; but it was deemed that cases might arise where the judicial power should be exercised against one of the chief governmental officers of the state in matters of such public importance that the cases should be at once passed upon by the supreme court, and therefore this power of mandamus and quo warranto was conferred. But it was never intended that this court should be a general resort in proceedings to set in motion the hundreds of minor officers with whom citizens or other officers may have business.

Stearns, 6 Wash. at 498–99. This Court should reject Pimentel’s invitation to expand the meaning of “state officer” for purposes of Article IV, § 4 beyond executive state officers and superior court judges.

K. Pimentel’s Effort To Convert His Writ Of Prohibition Into A Declaratory Judgment Action Should Be Rejected.

Pimentel argues that this Court can convert his request for a writ of prohibition into a declaratory judgment action. This Court cannot reach a question unless it has the jurisdiction to do so. *Brown v. Owen*, 165 Wn.2d 706, 717, 206 P.3d 310 (2009). This Court has no original jurisdiction in a declaratory judgment action. *Id.*; *Walker*, 124 Wn.2d at 411. Moreover, a declaratory judgment action requires a present, existing dispute between the parties. *Lee v. State*, 185 Wn.2d 608, 616, 374 P.3d 157 (2016); *Kitsap County v. City of Bremerton*, 46 Wn.2d 362, 369, 281 P.2d 841 (1955).

Even if this Court had jurisdiction, Pimentel is not entitled to a declaratory judgment for the same reasons that he has no standing to seek a writ of prohibition.

IV. CONCLUSION.

The writ of prohibition should be denied.

DATED this 4th day of September, 2020.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

Respectfully submitted,

/s/ Ann Marie Summers

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PROOF OF SERVICE

I, Jennifer Revak, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein; That on September 4th, 2020, I caused the foregoing document to be e-filed and e-served electronically through Washington State Supreme Court’s web portal as follows:

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

Dated this 4th day of September, 2020.

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