SUPREME COURT NO.
COURT OF APPEALS NO. 57332-6-II

IN THE WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON, Respondent
V.
JOSHUA CLARE, Petitioner

ON APPEAL FROM THE SUPERIOR COURT OF
WASHINGTON FOR CLARK COUNTY

The Honorable David Gregerson, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Supreme Court

Washington State

Statutes

Court Rules

Constitutional Provisions

Washington State Constitution

United States Constitution

I. IDENTITY OF PETITIONER

Petitioner, Joshua Clare, asks this Court to accept review of the Court of Appeals decision upholding the issuance of no bail arrest warrants for failing to appear.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the three-judge panel determination that no bail arrest warrants do not violate due process. A copy of the Court's published opinion is attached. Appendix at 1. This petition for review is timely.

III. ISSUES PRESENTED FOR REVIEW

Whether the issuance of a no bail arrest warrant for failure to appear violates due process when it applies a standard for bail determination that is not authorized by court rules or statute?

IV. STATEMENT OF THE CASE

The State of Washington charged Joshua Clare with two

counts of mail theft and third degree malicious mischief. Mail theft is a non-violent class C felony. At arraignment, the trial court did not set bail but ordered Clare to engage in every other week phone check-ins with supervised pretrial release, to keep contact information updated with the pretrial release officer and the court, and to attend all scheduled hearings. .

The trial court scheduled a readiness hearing, which Mr. Clare failed to attend. The government requested a bench warrant. Defense counsel objected to a no-bail warrant primarily citing Supreme Court order No. 57332-6-II related to COVID-19, while also referencing article I, sections 14 and 20 of the Washington State Constitution. The trial court rejected the defense arguments and issued a no-bail bench warrant for Mr. Clare's failure to appear at readiness.

In the wake of the issuance of the no bail warrant, Mr. Clare filed a petition for discretionary review. Mr. Clare's case was joined with multiple other Clark County Superior Court cases also seeking review of the Court's issuance of no bail

warrants for failure to appear at hearings in non-violent offenses.

At oral argument, the presiding judicial officer noted that Mr. Clare's case was completed. His petition for discretionary review was subsequently transferred to the Division Two Court of Appeals for review. Another case involving no bail warrants *State v. Chauncey*, 58960-5, was not set for oral argument at the same time as Clare and is still pending discretionary review. Counsel for Mr. Chauncey made a better record for appeal.

Prior to oral argument on the motion for discretionary review, Mr. Clare was arrested. The trial court set bail at $1,000 the day following his arrest in Clark County. Mr. Clare pleaded guilty to one count of mail theft days later and was sentenced to six days of confinement.

V. ARGUMENT FOR GRANTING REVIEW

1. Introduction

While Division 2 correctly determined that the issuance of a no bail warrant was an issue involving continuing and

substantial public interest, it was incorrect to rely on *Westerman v. Cary*, 125 Wn.2d 277 (1994). In *Westerman,* this Court found that courts may hold arrested persons up to 48 hours prior to a determining probable cause and setting the case for further hearings. However, Division Two took extended this Court's holding in *Westerman* to bail determinations, finding that *Westerman* allows court to hold arrestees up to 48 hours before determining bail, in addition to the other determinations authorized by the *Westerman* Court. In so holding, Division 2 overruled *State v. Reisert*, 6 Wn.App.2d. 321, (2021) and invalidated RCW 10.31.030 and case law flowing from that statute prohibiting corrections staff from searching an arrested person at booking without allowing them the opportunity to post bail. The appellate court also failed to recognize the dictum in *Westerman* that "when an arrest is made pursuant to a warrant, charges will have been filed and the judge issuing the warrant will determine probable cause and set bail." *Westerman*, 125 Wn.2d 277 at 288.

Moreover, Division 2 failed to address the fact that Washington is a right to bail state at the point of the probable cause determination. A pre-trial detainee can be denied bail only in specific and limited scenarios.

Clare reaches far beyond cases involving individuals hailed into custody on a no bail warrant for failure to appear for a known court date. The decision permits courts to issue no bail warrants for failure to appear on low level offenses, even if the individual may not have knowledge of a pending court date.

The ruling strips the right to due process and liberty from a large body of arrestees.

2. Division 2 denied Joshua Clare and others like him their constitutional right to bail after a determination of probable cause.

Neither the Washington State Constitution nor the Revised Code of Washington allows for no-bail holds, no matter how temporary, in unajudicated cases *unless* the defendant faces life imprisonment. The Washington Constitution expressly prohibits

excessive bail. Const. Art. 1, § 14. A no-bail warrant is the most excessive bond that can be ordered because it provides no opportunity to post bond and obtain release.

Unlike the federal constitution, Washington's constitution specifically provides the right to bail. Article 1, § 20 of the Washington Constitution establishes that "[a]ll persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great." The Washington Constitution only allows bail to be denied under certain circumstances for "offenses punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons ...." *Id.* The Washington Constitution contains no provision allowing a no-bail warrant to be issued on an unadjudicated offense that cannot result in life in prison.

Washington Supreme Court jurisprudence has long encouraged trial courts to set bail when appropriate because the

State is relieved of the burden of keeping the accused and the innocent are set free. *See State v. Jackschitz,* 76 Wash. 253, 256 (1913); *State v. Johnson,* 69 Wash. 612, 616 (1912).

As the *Jackshitz* court observed,

> "It is the manifest policy of the statute to encourage the giving of bail in proper cases, rather than to hold in custody at the state's expense persons accused of bailable offenses. The court should so administer cases arising under this statute as to give effect to this manifest policy."

Jackshitz, 76 Wn at 256, quoting *Johnson*, 69 Wn. at 616,

Federal Courts have long endorsed this practice. In *United States v. Feely*, 1 Brock. (U.S.) 255, 259 (1813), Justice John Marshall said:

> The object of a recognizance is, not to enrich the treasury, but to combine the administration of criminal justice with the convenience of a person accused, but not proved to be guilty. **If the accused has, under circumstances which show that there was no design to evade the justice of his country, forfeited his recognizance, but repairs the default as much as is in his power, by appearing at the succeeding term, and submitting himself to the law, the real intention and object of the recognizance are effected, and no injury is done.**

> If the accused prove innocent, it would be unreasonable and unjust in government to exact from an innocent man a penalty, intended only to secure a trial, because the trial was suspended, in consequence of events which are deemed a reasonable excuse for not appearing on the day mentioned in the recognizance. If he be found guilty, he must suffer the punishment intended by the law for his offense, and it would be unreasonable to superadd the penalty of an obligation entered into only to secure a trial. The reasonableness, then, of the excuse, for not appearing on the day mentioned in the recognizance, ought to be examined somewhere, and no tribunal can be more competent than that which possesses all the circumstances of the original offense and of the default.
>
> Should the legislature think otherwise, the case may be provided for by statute. At present, the law is understood to be that this court possesses full power over the subject. All proceedings, therefore, on this recognizance may properly be stayed, until it shall appear whether the accused shall continue to submit himself to the law, or shall attempt to evade the justice of the nation. This recognizance will await the final trial of the cause. In the mean time, the court is of opinion, **that an additional recognizance may be required, but not in such a sum as to amount to refusal of bail, or to be really oppressive.**

Feely, 1 U.S. at 259 (emphasis supplied), Appendix at 13.

Nothing in case law, court rule, statute or constitutional

provision allows for a no-bond warrant, or no-bail hold, on an unadjudicated matter that does not involve the death penalty or a potential life sentence. This is made clear by *State v. Reisert*, supra. Reisert made a preliminary appearance on a domestic violence offense in July 2019. Bond was set at $500 with electronic monitoring. While Reisert was still in custody, the state filed charges on a separate allegation. The court issued an order directing the issuance of a summons or warrant, fixing bail at $200,000. *Reisert*, 16 Wn.App.2d at 322. Reisert moved for an immediate hearing on release pursuant to CrR 3.2.1. The State opposed the motion, arguing that CrR 3.2.1 applied only to warrantless arrests. On appeal, Division I found, "[t]he title and restructuring of CrR 3.2.1 indicate the court intended to provide a right to a prompt preliminary appearance hearing to any defendant or accused detained following a warrantless arrest." *Id*. at 326. CrR 3.2.1 and its applicability to warrantless arrests make clear that the setting of bail when issuing a warrant is *required* in situations in which the accused does not face a life

sentence or the death penalty.

This Court recently addressed the issue of no-bail holds in the matter *of In re Sargent*. In *Sargent*, this Court held that the denial of bail is appropriate when the alleged crime is punishable by a statutory maximum of life in prison as set forth by Art. 1, § 20 (and defined by RCW 9A.20.021) and when the government demonstrates by clear and convincing evidence that the defendant shows such a propensity for violence that no condition or combination of conditions can reasonably assure the safety of the community. *In re Sargent*, 530 P.3d 666 (2023).

Because the criminal allegation that Mr. Clare faced did not carry a potential life sentence, there was no need to address the second prong of a showing of a propensity for violence. In such circumstances, the appropriate remedy to address a failure to appear is either to order the accused to appear at a subsequent hearing or to issue an arrest warrant with a reasonable bond pursuant to Const. Art. 1, §§ 14, 20 and *Westerman v. Cary*, *supra.* Congruity of CrR 3.2. RCW 10.21.040, and Const. Art. 1,

§§ 14, 20 clearly indicate that the no-bond arrest warrant is unlawful.

3. No-bond arrest warrants violate substantiative and procedural due process rights.

Article 1, § 3 of the Washington Constitution along with the due process clause of the Fourteenth Amendment provides, in part, that the State shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In facilitating such due process, the clause "confers both substantive and procedural protections." *State v. Beaver*, 184 Wn.2d 321, 332 (2015).

When the government seeks to interfere with a fundamental right—i.e., liberty—the action is subject to strict scrutiny and requires the infringement to be narrowly tailored to serve a compelling state interest. *In re Young*, 122 Wn.2d 1, 26 (1993). Such constitutional challenges are reviewed de novo. *Beaver*, 184 Wn.2d at 331.

Substantive and procedural due process analyses utilize the same three-factor balancing test set forth by *Mathews v. Eldridge.* These factors weigh: the affected private interest, the risk of erroneous deprivation of that interest through currently existing procedures, the probable value—if any—of additional procedural safeguards, and the governmental interest (including costs and administrative burdens) of additional procedures. *In re Det. of Stout,* 159 Wn.2d 357, 370 (2007); *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L.Ed.2d 18 (1976).

The practice of issuing no-bond warrants violates both substantive and procedural due process rights for each defendant subjected to such a warrant. Neither the government nor the Court have a compelling interest in issuing no-bail warrants for individuals who fail to appear for hearings associated with charged allegations not carrying a potential punishment of life in prison.

Art. 1, § 20 and RCW 10.21.040 provide guidance on necessary circumstances and procedures before depriving an

individual of their constitutionally entitled bail. Outside of the slip opinion in *Clare*, there is no legal authority that allows for a no-bail arrest warrant in a pre-trial matter that cannot result in a life sentence. There is no amendment, statute, case law, or court rule that permits a trial court to supplant the constitutional right to bail after determining probable cause for a crime that cannot result in a life sentence *Westerman* made clear that a bond is not required prior to the establishment of probable cause in cases of warrantless arrests. *Westerman* does not allow for a person to be held without bond after probable cause is established unless one of the very limited exceptions under Article 1, § 20 applies. To conclude that no-bond warrants may issue is to misread *Westerman, ibid,* and *Reisert, ibid.*

The government cannot argue that it has a compelling interest in requesting no-bail warrants on all failures to appear for the sake of judicial economy, as it is unconstitutional to do so: setting a reasonable monetary bail takes minutes and comports with the requirements of constitutional due process.

Even assuming, *arguendo*, that the government and the Court have a compelling interest in requesting and issuing no-bail warrants for a failure to appear, the Court does not narrowly utilize/tailor this action as required by the State Constitution. This is evidenced by two key features: first, until recently, when defendants began to file motions for discretionary review on each Clark County case where a no bail warrant was issued, the government's default position was to request no-bail warrants regardless of the level of allegation faced by the accused. Second, the practice of the Court was to regularly acquiesce to the government's blanket requests and issue warrants without bail.

Continued solicitation of no-bail warrants on behalf of the government is similarly in direct opposition to guidance set forth by RPC 3.8, Comment 1, which states: "A prosecutor has the responsibility of a minister of justice, and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, and that guilt is decided upon the basis of sufficient evidence."

The first factor—an individual's personal interest in freedom or liberty from state constraint—is always a substantial concern. *Addington v. Texas*, 441 U.S. 418, 425 (1979). Mr. Clare and similarly situated individuals have an ongoing substantial interest in obtaining procedural justice by avoiding incarceration without proper procedural safeguards or constitutionally entitled bail.

The risk of erroneous deprivation of liberty when trial courts are allowed to routinely issue no bail warrants is high despite our strong Constitutional and statutory protections. Pretrial bail may only be denied for allegations with a maximum sentence of life in prison. This is not an issue for Mr. Clare and many other defendants like him who have been slapped with no bail warrants for low level, non-violent offenses.

When arrested under a no bail warrant, Mr. Clare, and others like him, may be incarcerated in a county outside of Clark—or even a state other than Washington. There is no ability to secure freedom until appearing in Clark County. Many

arrested individuals will face significant and mounting issues such as being cut off from support networks, losing needed benefits, being unable to meet or resolve medical or mental health issues, job loss, and even loss of housing. The individual can face a long bus ride back to Clark County in shackles despite being cloaked by the presumption of innocence.

Finally, as to the third factor, the government faces no additional financial or administrative burdens as defense counsel is merely requesting the government and the Court properly apply existing due process procedures as set forth by Art. 1, §§ 14, 20 of the state constitution, U.S. Const. amend. XIV, § 1, and RCW 10.21.040.

4. The no-bond warrant issued in Mr. Clare's case and the ruling in the Slip Opinion violates Superior Court Rules, state statutes, and existing case law.

CrR 3.2 governs pretrial release and honors the mandate that pretrial detention is the exception. Under CrR 3.2, unless a

person is charged with a crime for which they could face the death penalty or life in prison, there is a presumption they will be released without any conditions pretrial. *Butler v. Kato*, 137 Wn.App. 515, 522-23 (2007). Neither this presumption nor the presumption of innocence would be honored by granting routine blanket governmental requests for the accused to be held without bond.

CrR 2.2(c) requires that "[i]f the offense is bailable, the judge shall set forth in the order for the warrant, bail, or other conditions of release" *emphasis added*. All offenses have the potential for bail. Upon a showing that a defendant faces life imprisonment, and after meeting certain prerequisites, bail may be denied in very limited circumstances. None of these circumstances include "the defendant failed to appear for a court hearing on an offense that cannot result in life in prison."

Even in cases involving a potential life sentence, no-bail warrants should be far from routine. RCW 10.21.040 provides that the court must find by clear and convincing evidence in

circumstances where there is a potential for life imprisonment, that an individual "shows a substantial propensity for violence that creates a likelihood of danger to the community or any persons." The court must also find that no condition or combination of conditions will reasonably assure the safety of any other person and the community, so that pretrial detention is necessary. This all must occur during the hearing at which the accused failed to appear, before any warrant is issued.

Joshua Clare did not face an offense described in Art. 1, § 20. He was charged with two nonviolent property offenses. There was no allegation of a subsequent criminal law violation. There was no possibility that he could be sentenced to life in prison. He was presumed innocent. The only allegation was that, during a global pandemic, he missed a court date and did not call pretrial services. The Court had no legal authority to deny a bond for a pretrial failure to appear on these allegations.

Further, nothing in CrR 3.2 allows the court to establish no-bail warrants on unadjudicated Class C felonies in which a

determination of probable cause has been made. *See* CrR 3.2(f). Violations of release conditions (e.g., failure to appear) are governed by CrR 3.2(k)(2). That rule requires a showing that the accused willfully violated a condition of release. CrR 3.2(k)(2) requires the court to hold a hearing before revoking release or forfeiting bail. Release may be revoked only if the willful failure to comply resulting in a violation is proved by clear and convincing evidence. Without knowing the basis for a failure to appear, it would be exceedingly difficult to prove a willful violation by clear and convincing evidence. Defendants may fail to appear for a number of innocent reasons, such as confusion, illness, lack of income, mental illness, or lack of notice. While a person may be held without bail before the court establishes probable cause and sets conditions of release, there is nothing that supports issuing no-bail warrants on unadjudicated cases after probable cause has been determined in the case. *See Westerman v. Cary*, 125 Wn.2d 277 (1994).

Pretrial release and liberty are supposed to be "the norm,"

not an exceptional or unusual situation. *United States v. Salerno*, 481 U.S. 739, 742 (1987). It is a fundamental principle that the Court may not issue a no-bail warrant on an unproven accusation. *Hudson v. Parker,* 156 U.S. 277, 285 (1895); *State v. Barton*, 181 Wn.2d 148 (2014).

Here, the government offered nothing to justify the issuance of a no-bond arrest warrant on a person who had not received written notice of the hearing and only received oral notification. The Court did not make the requisite finding that Mr. Clare's violation of his conditions of release was willful. In fact, it could not make that finding, for the reasons specified herein.

RCW 10.31.030 provides each person arrested on an arrest warrant the opportunity to post bail. The statute provides that an officer making an arrest on a warrant shall, at the request of the arrested, allow the person to post bail.

Washington is a right to bail State. As such, it is incongruent for the government to seek warrants without bond,

as well as for the Court to grant such a request following a determination of probable cause.

5. Until this Court directs otherwise, trial courts will continue to violate the substantive and procedural due process rights of accused individuals.

The government makes it clear it will continue to issue blanket requests for no-bond warrants whenever, and wherever, possible. The trial court has not, and will not, comply with Art. 1, §§ 14, 20 requirements to establish a reasonable bond. Until this Court directs compliance, violations of the rights of the accused will continue to occur.

VI. CONCLUSION

Division 2 failed the accused in Washington when it indicated that the right to bail attaches only after a person has been detained for 48 hours. Mr. Clare requests this court accept the petition for review and end the archaic practice of issuing no

bail warrants contrary to Art. 1, §§ 14, 20, Superior Court Rules, and Washington case law.

This brief complies with RAP 18.17 and is approximately 3654 words long.

Respectfully submitted this 11th day of April, 2024.

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Appendix Table of Contents

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

March 12, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSHUA CLARE, Petitioner.	No. 57332-6-II PUBLISHED OPINION

CHE, J — Joshua Clare appeals the issuance of a no-bail bench warrant issued due to his failure to appear at a pretrial hearing. Clare was arrested under the aforementioned warrant, and the following day, the trial court set bail at $1,000. Clare pleaded guilty to one count of mail theft several days later.

We hold that the issuance of the no-bail bench warrant presents an exception to the mootness doctrine under the continuing and substantial public interest exception. Although Clare fails to present a manifest constitutional error warranting review, we exercise our discretion under RAP 2.5 to reach the constitutional issues, but not the state-statutory or court-rule issues as they were not preserved below.

We hold that when the trial court issues a no-bail bench warrant for failure to appear after the probable cause determination, it does not violate our state constitutional right to bail so long as a subsequent bail determination is held within 48 hours of that arrest. Because Clare received a timely bail determination, his right to bail was not violated. We also hold that the issuance of a no-bail bench warrant for a failure to appear does not violate due process. We affirm.

FACTS

The State charged Clare with two counts of mail theft and third degree malicious mischief. At arraignment, the trial court did not initially set bail but ordered Clare to engage in every other week phone check-ins with supervised pretrial release, to keep contact information updated with the pretrial release officer and the court, and to attend all scheduled hearings. The trial court scheduled a readiness hearing. The order establishing release conditions provided the following notice,

> Violations of the conditions as specified above, may result in penalties including but not limited to custody in jail, increased reporting requirements, revocation of release, increase or modification of bail and/or other conditions of release. Violation of the conditions specified above may also result in issuance of a warrant for your arrest.

Clerk's Papers (CP) at 16 (boldface omitted). Clare did not report to pretrial services as ordered.

Subsequently, Clare failed to attend the readiness hearing. The State requested a bench warrant. Defense counsel objected to a no-bail warrant largely under a Supreme Court order

related to COVID-19,[1] while also giving a single reference to article I, sections 14 and 20 of the Washington Constitution.

The trial court then issued a no-bail bench warrant for failing to appear. Clare was arrested, and the trial court set bail at $1,000 the next day. Clare pleaded guilty to one count of mail theft days later and was sentenced to six days of confinement.

Clare appeals the imposition of the no-bail bench warrant.

ANALYSIS

I. MOOTNESS

The State argues that the bail issue is moot. Clare argues that the issuance of the no-bail bench warrant presents a matter of continuing and substantial public interest. We agree with Clare.

[1] Among other things, the order provided,

> Courts may exercise discretion in deciding whether a bench warrant should issue for failure to appear for criminal or juvenile offender court hearings or pretrial supervision meetings, or violations of conditions of release. However, in exercising such discretion, courts shall consider the following before issuing a warrant: a) Is a warrant necessary for the immediate preservation of public or individual safety? b) Is there a record that the subject of the warrant has received actual notice of the previously scheduled court hearing or reporting requirement? c) Is there a viable alternative for securing appearance such as the re-issuance of a summons or another means of notifying the subject that an appearance is required and re-setting the hearing date?

Order, No. 25700-B-658, *Fifth Revised and Extended Ord. Regarding Ct. Operations*, at 9 (Wash. Feb. 19, 2021) https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/25700-B-658.pdf.

"An issue is moot if we can no longer provide effective relief." *State v. Ingram*, 9 Wn. App. 2d 482, 490, 447 P.3d 192 (2019). Because Clare was subsequently released, the issue of pretrial bail is moot.

But we may review a moot issue where it presents an issue involving "matters of continuing and substantial public interest." *Id.* "In determining whether a case presents an issue of continuing and substantial public interest, we consider (1) the public or private nature of the issue, (2) whether guidance for public officers on the issue is desirable, and (3) the likelihood that the issue will recur." *Id.* If it is likely that the controversy will escape review in the future due to the short-lived nature of the relevant facts, that weighs in favor of review. *Id.*

The setting of bail is an issue of public nature. *Id.* Deciding the propriety of a no-bail bench warrant for a failure to appear after the initial bail determination will provide guidance to public officers for an issue that is likely to recur. And because pre-trial no-bail bench warrants become moot either as soon as the trial court holds a hearing addressing bail and release conditions, or after the disposition of the case, the short-lived nature of the no-bail bench warrant issue weighs in favor of review. Accordingly, Clare's bail arguments fit within the continuing and substantial public interest exception.

II. ISSUE PRESERVATION

Clare challenges the imposition of his no-bail bench warrant on multiple grounds: violation of the state constitutional right to bail, his state and federal substantive and procedural due process rights, and various superior court rules and state statutes. The State argues that we should decline to review these arguments because they are not properly preserved. We agree that the arguments are unpreserved and that Clare fails to show a manifest constitutional error.

Under RAP 2.5(a), we may decline to review unpreserved errors. "A party must inform the court of the rules of law it wishes the court to apply and afford the trial court an opportunity to correct any error." *State v. Lazcano*, 188 Wn. App. 338, 355, 354 P.3d 233 (2015). To adequately preserve the issue for appellate review, the argument should be more than fleeting. *Id*. "We may decline to consider an issue that was inadequately argued below." *Id*.

However, a party may raise an unpreserved error if they show that the error presents a "manifest error affecting a constitutional right." RAP 2.5(a)(3). A party may show the alleged error is manifest by demonstrating actual prejudice, which occurs where there is a plausible showing that the error caused "'practical and identifiable consequences in the trial of the case.'" *State v. J.W.M.*, 1 Wn.3d 58, 91, 524 P.3d 596 (2023) (quoting *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). An error is identifiable if the record is "'sufficient to determine the merits of the claim.'" *Id*. (quoting *O'Hara*, 167 Wn.2d at 99). But a cursory reference to a constitutional provision may be inadequate to preserve an issue for appeal. *State v. Davis*, 175 Wn.2d 287, 344, 290 P.3d 43 (2012), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018).

Here, Clare objected to the issuance of the bench warrant, citing to a Supreme Court order providing guidance on whether to issue a warrant for failing to appear during the COVID-19 pandemic, and to a single reference to "Article 1, Sections 14 and 20 . . . of the Washington State Constitution." Rep. of Proc. at 4. Clare does not argue that the bench warrant violated the Supreme Court order on appeal. Clare did not pursue the constitutional arguments further.

Under these circumstances, Clare's argument under the state constitution was fleeting and thus failed to adequately present the issue to the trial court. The single reference did not draw attention to any relevant standards, considerations, or case law. For these reasons, the issue was not properly preserved for appeal. And Clare did not even reference his arguments regarding due process, superior court rules, and various RCWs with the trial court. So those issues are also not properly preserved.

Because the aforementioned issues were not preserved, we analyze whether they warrant review under RAP 2.5(a)(3). On appeal, Clare provides one sentence to meet his RAP 2.5 burden. Br. of Appellant at 16-17 ("While appellate courts generally will not consider issues raised for the first time on appeal, there is a limited exception that a claim may be raised for the first time on appeal if it is a manifest error affecting a constitutional right."). This is insufficient.

Even if Clare's arguments can be collectively characterized as constitutional, Clare does not attempt to show that any of the alleged errors are manifest. The trial court set bail the day after Clare was arrested on the bench warrant. Clare does not explain how that short duration had practical and identifiable consequences in the trial of the case.

We determine that Clare's arguments related to the superior court criminal rules and RCWs do not warrant review under RAP 2.5(a)(3) and decline to reach them. But we exercise our discretion to reach the constitutional issues.

III. CONSTITUTIONAL RIGHT TO BAIL

Clare argues that imposing no-bail bench warrants—on defendants charged with offenses that cannot result in life in prison—violates the state constitutional right to bail.[2] We disagree.

"'We review allegations of constitutional violations de novo.'" *State v. Johnson*, 180 Wn.2d 295, 300, 325 P.3d 135 (2014) (quoting *State v. Siers*, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012)). Article 1, section 20 of the Washington Constitution provides that "[a]ll persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great."

In *Westerman*, our Supreme Court held that the right to a judicial determination of reasonable bail or release "must be made as soon as possible, no later than the probable cause determination," which must be accomplished within 48 hours. *Westerman v. Cary*, 125 Wn.2d 277, 292, 892 P.2d 1067 (1994). "[D]etention without bail pending a speedy judicial determination does not violate Const. art. 1, § 20." *Id*. at 291. The court further provided, "We decline to extend the right to bail beyond what it has traditionally been: the right to a judicial determination of reasonable bail or release." *Id*. at 291-92.

[2] Clare also appears to argue that the issuance of the no-bail bench warrant violated the state constitutional prohibition on excessive bail. He provides a single sentence to this end, "The Washington Constitution expressly prohibits excessive bail. Const. Art. 1, § 14. A no-bail warrant is the most excessive bond that can be ordered because it provides no opportunity to post bond and effectuate liberty." Br. of Appellant at 12. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *In re Parental Rights to D.J.S.*, 12 Wn. App. 2d 1, 42, 456 P.3d 820 (2020), *abrogated on other grounds by In re Dependency of G.J.A.*, 197 Wn.2d 868 (2021). This one sentence is insufficient to merit our review.

As a preliminary matter, the language in article 1, section 20 does not expressly mention bench warrants or require that bench warrants provide for bail. Nor does that language imply that such warrants must provide for bail or when bail must be provided.

Clare appears to argue that *Westerman* grants Clare the continuing right to bail at all times after the probable cause determination in non-capital cases, and that right is not interrupted by the issuance of a bench warrant for failing to appear. We disagree. We do not interpret *Westerman* as requiring that every bench warrant provide for a bail amount each time a judge issues a bench warrant for the defendant's failure to appear after the probable cause determination in non-capital cases. Rather, after the defendant is arrested on the bench warrant, *Westerman* requires that a bail determination be made as soon as possible, no later than 48 hours after that arrest.

Thus, the initial decision to issue the no-bail bench warrant—after the probable cause determination—for failure to appear in this matter did not violate Clare's constitutional right to bail. And because Clare received a bail determination within 48 hours of being detained on that bench warrant, his right to bail was not violated.

IV. DUE PROCESS

Clare argues that the imposition of the no-bail bench warrant violates substantive and procedural due process under the federal and state constitution We disagree.

The federal due process clause protects the right to be free from bodily restraint. *State v. Beaver*, 184 Wn.2d 321, 331, 358 P.3d 385 (2015). Our analysis of state and federal due process clause claims is the same. *Nielsen v. Dep't of Licensing*, 177 Wn. App. 45, 52 n.5, 309 P.3d

1221 (2013) ("the state due process clause is coextensive with and does not provide greater protection than the federal due process clause.").

A. *Substantive Due Process*

"The substantive component of the due process clause bars wrongful and arbitrary government conduct, notwithstanding the fairness of the implementing procedures." *Beaver*, 184 Wn.2d at 332. Pretrial detentions implicate an individual's fundamental liberty interest. *See Westerman*, 125 Wn.2d at 292.

In *Westerman*, Westerman argued that the district court's general order—providing that domestic violence offenders were to be detained in jail without recourse to bail pending their first court appearance—violated substantive due process. *Id*. at 293. Our Supreme Court recognized "restrictions on liberty that comply with the Fourth Amendment and which do not constitute impermissible punishment do not violate substantive due process." *Id*. And the court held,

> Given the limited nature of the detention and the legitimate reasons behind the Order, we do not find that the Order violates substantive due process. Under our ruling today, the Order imposes no more significant restraint on liberty than that allowed by the Fourth Amendment . . . because the probable cause and release hearing must be held within 48 hours of detention.

Id. at 293-94. For the same reasons as outlined in *Westerman*, we determine that the no-bail bench warrant did not violate Clare's substantive due process rights.

B. *Procedural Due Process*

"Procedural due process requires that when the State seeks to deprive a person of a protected interest, the State provides the individual adequate notice of the deprivation and a meaningful opportunity to be heard." *Beaver*, 184 Wn.2d at 336.

"In determining what procedural due process requires in a given context, we employ the *Mathews* test, which balances: (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures." *In re Det. of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007).

Under the *Matthews* test,[3] we determine that procedural due process is not violated here. First, Clare has a significant interest in his physical liberty to be free from restraint. Although we recognize that the length of the infringement is less than 48 hours, the first factor weighs in Clare's favor.

Second, the risk of erroneous deprivation of Clare's liberty through existing procedures and the probable value, if any, of additional procedural safeguards, is minimal and weighs in the State's favor. There are procedural safeguards in place before and after the issuance of a bench warrant. The trial court notifies defendants of the relevant court date, and in this instance, the scheduling order explicitly provided notice that failure to appear for the readiness hearing "may result in the issuance of a warrant and may constitute the crime of Bail Jumping." CP at 6. And

[3] The *Mathews* balancing test is the inappropriate procedural due process framework for assessing "'state procedural rules which . . . are part of the criminal process.'" *Jauch v. Choctaw County*, 874 F.3d 425, 431 (5th Cir. 2017) (quoting *Kaley v. United States*, 571 U.S. 320, 334 (2014)). The alternative *Medina* test is a less exacting framework to satisfy. *Id*. at 432. We need not decide which framework applies because the challenged practice here satisfies procedural due process requirements under the more stringent *Mathews* framework.

the release condition order provided functionally the same notice. As the trial court is present when the defendant fails to appear, a violation of that pretrial condition is manifestly apparent.

Clare emphasizes that the risk of erroneous deprivation exists as (1) individuals arrested outside of Clark County could not challenge the deprivation for failure to appear until appearing in Clark County, and (2) without citation, Clare asserts that no-bail bench warrants issue in cases where the summons was not sent or that the service of the summons was improper. We recognize that Clare's concerns demonstrate some risk of erroneous deprivation.

But importantly, Clare does not discuss what additional procedural safeguards would be valuable. In fact, Clare specifically states, "defense counsel does not seek any additional procedural safeguards." Br. of Appellant at 27. As we held above, there is the additional procedural safeguard that after the defendant is arrested on the bench warrant, a bail determination must be made as soon as possible, no later than 48 hours after that arrest. And as discussed above, that right stems from the constitutional right to bail. Thus, if the court fails to hold such a hearing within 48 hours, the defendant could challenge the unlawful restraint in the courts under the constitution of the State of Washington. That safeguard mitigates the risk of an ongoing erroneous deprivation. We determine that the second factor weighs in the State's favor.[4]

Third, "[t]he government has compelling interests in preventing crime and ensuring that those accused of crimes are available for trial and to serve their sentences if convicted." *Westerman*, 125 Wn.2d at 293. The third factor also weighs in the State's favor. We hold that

[4] We note that during the 11 days that passed between the readiness hearing and the issuance of the bench warrant, the record does not show that Clare appeared before the court, requested a court date, or checked in with pretrial services.

the practice of issuing no-bail bench warrants due to the accused's failure to appear in a non-capital case does not violate procedural due process provided the defendant arrested on said warrant receives a bail determination as soon as possible, no later than 48 hours after that arrest.

CONCLUSION

We affirm.

Che, J.

We concur:

Maxa, P.J.

Price, J.

UNITED STATES v. FEELY ET AL.

{1 Brock. 255.}[2]

Circuit Court, D. Virginia. May Term, 1813.

CRIMINAL LAW—RECOGNIZANCE—FAILURE TO APPEAR—FORFEITURE—POWER OF COURT TO SUSPEND.

Where an individual is charged with the commission of a criminal offence, and enters into a recognizance, conditioned to appear at a given day, and undergo his trial, which recognizance is forfeited by the failure of the party to appear and submit himself to the law; but the accused appears at the succeeding term of the court, the court in which the recognizance is filed has full power to suspend (or discharge?) it, for good cause shown by the accused, why he did not comply with the condition of the recognizance; the object of such a recognizance being, not to enrich the treasury, but to combine 1056 the administration of criminal justice with the convenience of a person accused of a criminal offence, but not proved to be guilty.

{Cited in U. S. v. Duncan, Case No. 15,004.}

{Cited in Caldwell v. Com., 14 Grat. 705; State v. Hoeffner, 124 Mo. 488, 28 S. W. 7.

At law.

Before MARSHALL, Circuit Justice, and TUCKER, District Judge.

MARSHALL, Circuit Justice. This is a motion made to stay proceedings on a scire facias, which has been sued out of this court, by the attorney of the United States, against Feely and his security, requiring them to show cause, why execution should not be had against them, on a recognizance entered into by them, conditioned for the appearance of the said Feely, on the first day of the last term, to answer an indictment filed against him in this court. Feely did not appear, and his default was recorded. He appeared on the first

day of this term, and is now in custody, on the motion of the attorney for the United States.

It is contended, on the part of the United States, that the court possesses no power over this recognizance; that being forfeited, it has become a debt due to the United States, which is no more subject to the control of this court, than a debt upon contract.

It is admitted, on the part of the United States, that in England, the court of exchequer exercises this power. But the statutes of 33 Hen. VIII. (chapter 39), and of 1 Geo. II., expressly delegate it, and it is contended, that from these statutes alone, the authority of the court of exchequer is derived. Mr. Bacon, in his Abridgment (volume 2, p. 150), says, that it is by virtue of 33 Hen. VIII., that courts of exchequer discharge recognizances, and his opinion is certainly entitled to respect.

It is contended by the counsel for the prisoner, that these statutes are made in affirmance of the common law. For this there is no dictum in the books. But if they do not simply give a statutory form to a rule of the common law, there is reason to believe that they permit a principle to be exercised, directly and effectively, which was before not absolutely unknown to the court. They authorise a discharge, or a compounding of recognizances, and, perhaps, without them, recognizances could not be absolutely discharged or compounded. But it does not follow necessarily, that the same effect might not be indirectly produced by a perpetual suspension. It is apparent, that the power given by statute is conferred on the court of exchequer only; consequently, the power exercised by the courts of common law, is derived, not from the statute, but the common law.

It is admitted by the prosecutor, that the power which the courts of common law exercised over recognizances in England, may, in the United States, be exercised by this court. Let us, then, inquire what

that power is? The attorney relies upon the case of Reg. v. Lord Drummond, 11 Mod. 200. In that case, a motion made on the day of appearance to discharge the recognizance, because the cognizor was sick and unable to appear, was overruled by the court, notwithstanding the consent of the attorney for the crown, because the court could not grant the motion; but the time for appearance was enlarged. The officers of the crown are generally sufficiently attentive to its interests, and it is somewhat extraordinary, that one of them should consent to release a debt, which debt was absolutely beyond the power of the court. The expression employed by the judge, may be used in reference to the propriety of the order. But, admitting it to import a positive legal inability to grant the motion, it will be recollected, that the motion was for an absolute discharge of the recognizance. A declaration, that the court could not discharge it, was not equivalent to a declaration, that the court could exercise no power over it. In fact, the court did proceed to relieve the party from his default, by extending the time for his appearance. If the court possessed no power over the subject; if, upon failure to appear, the debt, according to the terms of the recognizance, became absolute, and was placed beyond the power of the court, it would be difficult to support the order which was actually made. The case of Reg. v. Ridpath, 10 Mod. 152, does not bring into view the power of the court. It did not, in any degree, turn on that point. The case of Rex v. Tomb, 10 Mod. 278, is vaguely reported, and its circumstances are omitted. In that case, however, the principle is expressly laid down, that "judges of oyer and terminer are the proper judges whether recognizances ought to be estreated or spared;" that is, that the court in which the recognizance is filed, decides after default made, whether the attorney for the crown shall estreat the recognizance, in order to put it in suit. It will be

recollected, that in England, the recognizances of this description are filed in a court of criminal jurisdiction, and sued, not in that court, but in the court of exchequer. "No instance," says the book (Rex v. Tomb); "can be produced, of a certiorari to remove a recognizance for appearance from a court of oyer and terminer. It would be to take away a jurisdiction that properly belongs to them." "It is for the advantage of public justice, that it should be in the power of justices of oyer and terminer to spare the recognizance, if, upon the circumstances of the case, they see fit." This, then, is an express decision, that the court in which the recognizance is filed, may, if, upon the circumstances of the case, they see fit, after default has been made, and the recognizance is forfeited, refuse to permit it to be estreated, in order to be put in suit. It is a question exclusively for their decision, and no other court will control or inquire into the propriety of that decision. This power remains so long as the recognizance remains in court. When once estreated, the recognizance 1057 and all power over it are transferred to another tribunal.

In the United States, there is no separate court of exchequer; and recognizances are put in suit in that court in which they are originally filed. They are never estreated. The power which the courts of law in England exercise on the question, whether a recognizance shall be estreated or not, is exercised after default, and continues as long as the recognizance remains in court. It is dependent on the discretion of the court, and, according to Hawkins, is applied in relief of the cognizor, if the person who has forfeited it, shall appear at the next succeeding term and take his trial. The same power existing in this court may, it would seem, as in England, be exercised so long as the recognizance continues in court. If, when the default was recorded, it had been shown to the court that the accused was in custody of the law, then, according to

the case in 11 Mod., the court might have extended the recognizance. Why may not the excuse be made as effectually at a subsequent day? The case of Rex v. Eyres, 4 Burrows, 2118, is also reported in a very unsatisfactory manner. It is not improbable that the case had been compromised in the court of exchequer. There is too much uncertainty in he report to rely much upon it.

The authority on which the court most relies is Mr. Blackstone. In his 4th volume (page 254) he says: "A recognizance may be discharged, either by the demise of the king, to whom the recognizance is made, or by the death of the principal party bound thereby, if not before forfeited, or by the order of the court, to which such recognizance is certified by the Justices, (as the quarter sessions, assizes, or king's bench,) if they see sufficient cause." Upon authority, then it appears, that entirely independent of the statute, the courts of England exercise the power which this court is now required to exercise. It is not an unreasonable power. The object of a recognizance is, not to enrich the treasury, but to combine the administration of criminal justice with the convenience of a person accused, but not proved to be guilty. If the accused has, under circumstances which show that there was no design to evade the justice of his country, forfeited his recognizance, but repairs the default as much as is in his power, by appearing at the succeeding term, and submitting himself to the law, the real intention and object of the recognizance are effected, and no injury is done. If the accused prove innocent, it would be unreasonable and unjust in government to exact from an innocent man a penalty, intended only to secure a trial, because the trial was suspended, in consequence of events which are deemed a reasonable excuse for not appearing on the day mentioned in the recognizance. If he be found guilty, he must suffer the punishment intended by the law for his offence, and

it would be unreasonable to superadd the penalty of an obligation entered into only to secure a trial. The reasonableness, then, of the excuse, for not appearing on the day mentioned in the recognizance, ought to be examined somewhere, and no tribunal can be more competent than that which possesses all the circumstances of the original offence, and of the default. Should the legislature think otherwise, the case may be provided for by statute. At present, the law is understood to be that this court possesses full power over the subject. All proceedings, therefore, on this recognizance may properly be stayed, until it shall appear whether the accused shall continue to submit himself to the law, or shall attempt to evade the justice of the nation. This recognizance will await the final trial of the cause. In the mean time, the court is of opinion, that an additional recognizance may be required, but not in such a sum as to amount to refusal of bail, or to be really oppressive. It is the direction of the court, that the prisoner stand committed until he shall enter into a recognizance himself, in the sum of $500, and one or more sureties in the same sum, conditioned as the law requires.

[2] {Reported by John W. Brockenbrough, Esq.}

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