No. 98154-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JULIAN PIMENTEL,

Petitioner,

v.

THE JUDGES OF THE KING COUNTY SUPERIOR COURT and

DAN SATTERBERG, KING COUNTY PROSECUTING ATTORNEY,

Respondents,

BRIEF OF WACDL, KING COUNTY DPD, WDA, AND ACLU-WA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI*

The identity and interest of *amici* are addressed in the accompanying motion for leave to file an amicus brief.

ISSUE ADDRESSED BY *AMICI*

Julian Pimentel challenges the King County Superior Court's practice of issuing *ex parte* arrest warrants raising bail for represented defendants following their preliminary appearance hearing. *Amici* write separately to emphasize the particular harm the Superior Court's practice inflicts on indigent defendants and the pressing need for this Court to reach a decision on the merits of this case.

INTRODUCTION

Nearly every day in the King County Jail, criminal defense attorneys answer some variation of the following questions:

- "The judge said my bail was $10,000. Why is the jail guard telling me my bail is $100,000?"
- "The judge released me on personal recognizance and told me to check my mail. I never got anything in the mail, and I never missed a court date. Why did the police pull me over and put me in handcuffs in front of my wife and kids?"
- "I gave the bondsman all my money and came back to court the next day like I was supposed to. Why was I arrested and thrown in a jail cell when I showed up for my court date?"

Attorneys in King County are left to give some variation on the following answer: "The King County Prosecutor and the King County Superior Court Judges communicate in private in between your court hearings. They change your bail and issue orders for the police to arrest you without telling you or your lawyer. And now that you've been arrested again, you have to wait up to two weeks to see a judge to request a bail reduction. It's like this because for the better part of half a century no one has ever brought a challenge to this practice."

This answer not only fails to provide solace to a defendant detained in jail, it breeds disrespect for the court process and the rule of law. In many cases, a defendant's first interaction with the King County Superior Court is learning that a prosecutor and a judge communicated in secret about his case and issued a warrant without considering any mitigating information about his personal circumstances or exculpatory information about his case. Family and loved ones are left seething that the bail money they posted has been rendered worthless by a warrant determination made secretly in chambers instead of open court. A defendant who feels powerless due to her incarceration feels even more powerless knowing that the decision to jail her was made without hearing her side of the story.

Julian Pimentel has finally brought a challenge to this illegal practice. His arguments are legally sound, and the relief he seeks is within the power of this Court to grant. This Court should put an end to the unlawful practice of increasing a defendant's bail after a preliminary appearance hearing through the issuance of *ex parte* arrest warrants.

STATEMENT OF FACTS RELEVANT TO BRIEF

A person subjected to a warrantless arrest for a felony offense in King County is brought before a judge of the District Court for a preliminary appearance the next court day following the arrest. At this hearing, a deputy prosecuting attorney and a defense attorney address the court on the issue of conditions of release. The District Court Judge either sets bail or orders the arrestee released on personal recognizance. Another court date is set for one or two court days after the preliminary appearance hearing.

When a deputy prosecuting attorney requests and a Superior Court Judge issues an *ex parte* arrest warrant increasing bail after the preliminary appearance, it can affect a defendant in one of three ways. First, a defendant who was released on personal recognizance can be arrested and booked into jail, notwithstanding the fact that a judge who reviewed the case and considered the defendant's personal circumstances made a decision that imposing bail was inappropriate. Second, a defendant who posted a lower amount of bail can be rearrested and forced to pay a higher amount of bail or remain incarcerated. If she is unable to post the higher amount, any money paid to a bondsman is lost. Third, a defendant who was in-custody attempting to secure release can suddenly learn that the bail he will be required to post is much higher than initially

anticipated, and be stymied in whatever efforts he had made to raise money to secure his release.

A defendant who is rearrested on an *ex parte* warrant must wait a significant period of time for a bond hearing. The Superior Court and the Prosecuting Attorney do not bring a defendant arrested pursuant to an *ex parte* warrant to a preliminary appearance hearing the next court day following his arrest. Defendants who are rearrested pursuant to an *ex parte* arrest warrant thus have no opportunity to obtain judicial review of their bail and conditions of release until their arraignment hearing, which typically occurs one to two weeks after the rearrest. [1]

[1] The Superior Court Judges suggest that defendants could request expedited bond hearings following the issuance of a warrant. **Judges Resp. Br. at 22.** It is also the case, however, that the Prosecuting Attorney opposes holding prompt bond hearings for defendants arrested pursuant to an arrest warrant. *See* State's Brief in *State v. Reisert*, No. 80267-4-I, 2020 WL 3038963, at 9-11 (describing holding prompt release hearings for defendants taken into custody pursuant to a warrant as "absurd" and in "significant tension" with the Washington Constitution). What is more, the Superior Court's own local manual prohibits holding expedited bond hearings in cases involving sexual misconduct and domestic violence. *See* **Pet'r Reply Br. at 16**.

ARGUMENTS AND AUTHORITY

The King County Superior Court and the King County Prosecuting Attorney's system of issuing *ex parte* warrants after the preliminary appearance hearing promotes a system of pretrial incarceration that profoundly harms low-income defendants. Permitting the Superior Court Judges to change the conditions of release imposed at the preliminary appearance without considering the defendant's personal circumstances undermines court rules and statutes designed to ensure that pretrial conditions of release are just. This Court should address the merits of Mr. Pimentel's claims because the abuses of the *ex parte* warrant system are a systemic issue of profound importance to the current and future clients of *amici*.

I. The procedure employed by the Superior Court promotes needless incarceration that wreaks havoc among poor criminal defendants

When Mr. Pimentel learned that an arrest warrant had been issued, he was faced with the difficult choice of posting bond or living in fear of being arrested prior to his arraignment. Most criminal defendants, however, do not have the financial resources to even consider this choice. Instead, these individuals can be rearrested and forced to wait up to two weeks in jail before seeing a judicial officer and requesting release. The

practice of rearresting these individuals on the basis of a secret, *ex parte* warrant can be devastating.

This Court has taken an aggressive stance against prolonged and unnecessary pretrial incarceration by promulgating court rules that mandate prompt release hearings and a presumption of pretrial release. The court rules go beyond constitutional requirements, providing "enhanced procedural protections" to ensure that defendants have the opportunity to make a speedy and meaningful request for pretrial release. *Khandelwal v. Seattle Mun. Court*, 6 Wn.App. 2d 323, 334, 431 P.3d 506, 511 (2019). Thus, Superior Court Criminal Court Rule (CrR) 3.2.1(d)(1) provides that "any defendant" detained in jail must be brought before the Court the "next court day" following his or her arrest. The defendant must be assigned counsel and given the opportunity to argue "for pretrial release." CrR 3.2.1(e). Release is presumed for every arrestee unless the government can demonstrate that the defendant is likely to commit a violent offense, interfere with the administration of justice, or fail to appear for court. CrR 3.2. Reading these rules in concert demonstrates that this Court has made a clear policy decision to minimize excessive and unjustified pretrial incarceration.

The *ex parte* warrant process employed by the Superior Court Judges and the Prosecuting Attorney, by contrast, promotes unnecessary

pretrial incarceration of indigent defendants. Defendants who are rearrested on an *ex parte* warrant increasing their bail are denied the opportunity to see a judge quickly to review conditions of release. Instead of having the opportunity to request release the "next court day" following their arrest, they instead must wait in jail for up to two weeks for their arraignment hearing. *See* CrR 4.1 (setting a 14-day deadline for bringing a defendant to arraignment).

This particular period of incarceration can be devastating. Defendants who are held in jail for any significant period of time can lose their jobs. They can miss a rent payment and lose their housing. Parents can lose custody of their children. A woman who lives in a car could have her home towed and subjected to fees that she has no hope of ever paying. A man who sleeps on the street might have his tent and all his other personal belongings thrown away in a homeless camp sweep. Even a person with an employer who holds her position can be thrown into a financial spiral due to the financial impact of missing a half-dozen work shifts. *See* "Survey: Most Americans wouldn't cover a $1K emergency with savings," Adrian Garcia, *Bankrate* (Jan. 16, 2019).[2]

[2] Available at: https://www.bankrate.com/banking/savings/financial-security-january-2019/.

Academic research demonstrates that even short-term periods of pretrial incarceration can hurt both accused persons and the communities in which they live. In a study of over 150,000 jail bookings, researchers confirmed empirically just how disruptive and harmful an extra few days in jail can be. "The Hidden Costs of Pre-Trial Detention," Christopher Lowenkamp, et al., *Laura and John Arnold Foundation* (2013).[3] The researchers found that individuals held in pretrial detention for more than one day were less likely to appear for court and more likely to commit new criminal offenses in the months following their arrest. *Id.* at 4.

Troublingly, the study found that arrestees held in jail for 8-14 days before obtaining pretrial release—which is a typical period of pretrial incarceration following rearrest on an *ex parte* warrant in King County—were 41% more likely to commit a new criminal offense compared with an individual who obtained prompt pretrial release. *Id.* at 16. Even holding an individual in jail 2-3 days before granting pretrial release resulted in defendants being 22% more likely to miss court and 39% more likely to commit a new criminal offense than a defendant released within twenty-four hours . *Id.* at 4, 10. This research thus reinforces the principle the

[3] Available at: https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf.

court rules embody: courts should avoid any length of unnecessary pretrial incarceration.

When considering the harm caused by the Superior Court's *ex parte* warrant practices, this Court should also take note of the fact that the decision to issue an arrest warrant to increase bail for a person of color can have a disproportionate impact. Due to the legacy of slavery, Jim Crow, and racist housing and lending policies perpetrated by governments, courts, and businesses alike, Black families have been far less likely to accumulate wealth than White families in the United States. *See* "What Is Behind the Persistence of the Racial Wealth Gap?", Dionissi Aliprantis and Daniel Carroll, *The Federal Reserve Bank of Cleveland* (Feb. 28 2019).[4] The median White family in the United States has a net worth ten times greater than the median Black family. *Id.* (noting a wealth gap of $163,000 for the median White family compared to $16,000 for the median Black family). As a result, paying for and offering collateral to secure an unexpected bail increase may be a financial inconvenience for a White family, but a crisis for a Black family.

[4] Available at https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/2019-economic-commentaries/ec-201903-what-is-behind-the-persistence-of-the-racial-wealth-gap.aspx#D1.

II. The procedure employed by the Superior Court ignores the mandate that bail determinations be based on the individual circumstances of a defendant

The Superior Court Judges claim that if they are prohibited from issuing arrest warrants *ex parte*, the bail process would be transformed from "an individualized determination, as mandated by RCW 10.19.055, to a 'general course of conduct.'" **Judges Resp. Br. at 24.** The Superior Court Judges also claim that if they cannot file arrest warrants *ex parte*, they will be forced to set bail "based on less information" than was available in the District Court. *Id.* These assertions are both incorrect and deeply troubling.

In promulgating court rule 3.2, this Court made clear that a judge considering the imposition of bail and appropriate pretrial conditions of release should consider virtually every aspect of the defendant's life circumstances, including her: "employment status," "enrollment in an educational institution," "participation in a counseling or treatment program," "performance of volunteer work in the community," "participation in school or cultural activities," "receipt of financial assistance from the government," "family ties and relationships," "reputation, character and mental condition," "willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with conditions of release," and any other

"relevant fact." CrR 3.2(c)-(e). The legislature has reinforced these requirements, mandating that any judge setting conditions of release should consider the defendant's "character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, [and] community ties . . . " RCW 10.21.050(3)(a).

At the preliminary appearance hearing, the defendant is assigned counsel for the express purpose of gathering information regarding these factors and to argue "for pretrial release." CrR 3.2.1(e). The attorney can speak with the defendant to learn about his circumstances, visit with family members who have assembled in the courtroom gallery, and place phone calls to references to vouch for the defendant's character and willingness to comply with court orders. This advocacy is critical to assist the judge making the release decision to reach a just conclusion regarding pretrial release and any conditions imposed.

The prosecuting attorney's warrant application, by contrast, almost never includes any of this important mitigating information. The warrant application consists of the prosecutor's statement regarding why the defendant should be incarcerated and the police officer's statement regarding what felony offense occurred. It typically does not include any information about the personal mitigating information presented at the District Court hearing, much less a transcript of the defense counsel's

statements and the District Court Judge's reasoning in setting conditions of release.

Consider, for example, the hypothetical (but not uncommon) situation where a District Court Judge at the preliminary appearance reads a police report, hears argument from counsel, listens to statements from third parties, and issues the following ruling: "I recognize that the allegations in this case are serious, and I recognize that you have missed court in the past. But I'm impressed that your mother, your boss, and your counselor came to court to tell me about the recent positive changes you've made in your life and your willingness to take mental health medications. I also recognize that you are indigent because you recently had to go into debt to fix your car. I think that some bond is necessary to ensure that you come back to court, but I'm going to set your bail at $500."

A Superior Court Judge reviewing an *ex parte* application for a $10,000 arrest warrant several weeks later reads only that the prosecuting attorney disagrees with the District Court's bail determination because the defendant has 16 prior convictions, has missed court 32 times, and has mental health issues. Far from having "less information" than the District Court Judge, the Superior Court Judge is being asked to set bail based on a

document that dehumanizes defendants by reducing their lives to a summary of failures to appear and criminal convictions.

Indeed, the facts of this very case demonstrate the inaccuracy by omission of a warrant application. At Julian Pimentel's preliminary appearance hearing, his counsel made a persuasive argument regarding why release was appropriate. He pointed out that the detective had no opposition to releasing Mr. Pimentel, that the jail personal recognizance screener recommended release, and that Mr. Pimentel's father would accept responsibility for supervising Mr. Pimentel during the pendency of court proceedings. **ARP 3-5.** As a result, the District Court Judge determined that personal recognizance release was appropriate. **ARP 8-9.** The warrant application, as is typical, did not include any of this important mitigating information, and the Superior Court promptly issued a warrant setting bail at a level that would bankrupt most American families. **ARP 17-26.**

In light of this pattern, it is deeply concerning to learn that the Superior Court Judges believe that a District Court Judge presiding over a contested release hearing has "less information" than a Superior Court Judge reviewing an *ex parte* warrant application. While a warrant application will occasionally contain new information about the facts of an offense or a defendant's criminal history, it virtually always omits any of

the mitigating information presented at the preliminary appearance. The readiness of the Superior Court Judges to increase bail amounts based on the premise that a warrant application contains a fuller picture of a defendant's life than the argument at a preliminary appearance hearing reflects an "incarcerate first, ask questions later" mentality that directly contradicts the court rules' mandates regarding the role of defense counsel in advocating for pretrial release, the need to consider all relevant information about a defendant, and the mandatory presumption of release.

III. This Court should reach the merits of Mr. Pimentel's claim

The Superior Court Judges and the Prosecuting Attorney offer a slew of procedural reasons why this Court should avoid reaching the merits of Mr. Pimentel's claims. These include mootness, standing, the existence of an adequate remedy at law, and various challenges to the form of the writ filed by Mr. Pimentel. Each of these claims lack merit and would only serve to delay a resolution of an important issue that has been festering in King County for decades.

As a threshold matter, it would be virtually impossible to bring a live case or controversy before this Court on the issue of *ex parte* warrants. By definition, the problem with *ex parte* warrants is that defense counsel and the defendant aren't notified of the issuance of the warrant. Neither the Superior Court Judges nor the Prosecuting Attorney offers any

suggestion for how a defense attorney should file a challenge to an *ex parte* warrant of which she is not aware.

Even if an attorney were to learn of an *ex parte* warrant by happenstance (as apparently happened here), it is difficult to imagine bringing a live case or controversy to an appellate tribunal. As noted above, any defendant arrested pursuant to an *ex parte* warrant will have the opportunity to argue for release at the time of arraignment, which must be held within 14 days of the arrest. *See* CrR 4.1. While it is theoretically possible that a defendant could file an emergency writ in the Supreme Court during this time period, *see* RAP 18.12, it is difficult to imagine that completing briefing, argument, and an opinion in less than a week would promote thoughtful consideration of the issues presented. Indeed, in the recent case of *Colvin v. Inslee*, 195 Wn.2d 879, 467 P.3d 953 (2020), the time between the filing of the writ of mandamus related to the emergency of the COVID-19 pandemic and a final decision on the merits was several months.

What is more, this Court should consider the merits of this claim because it is a matter of profound public importance. Far from being a private dispute about Mr. Pimentel's case, his writ application implicates broad policy matters that affect defendants in the King County Jail almost every single day. As this Court has stated, there is no good reason to

avoid issuing a decision on the merits of a complex and important issue that is squarely presented to the Court:

> Where a controversy is of serious public importance and immediately affects substantial segments of the population and its outcome will have a direct bearing on the commerce, finance, labor, industry or agriculture generally, questions of standing to maintain an action should be given less rigid and more liberal answer.

Washington Natural Gas Company v. Public Utility Dist. No. 1, 77 Wn.2d 94, 96, 459 P.2d 633, 635 (1969). So too here.[5]

Finally, it bears noting that in past cases involving a lower court adopting an unlawful policy relating to the administration of criminal justice, this Court has not been overly-formalistic in addressing the form of the writ. In *Vovos v. Grant*, for example, the petitioners sought alternative writs, either in the form of a writ of review or a writ of prohibition. 87 Wn.2d 697, 699, 555 P.2d 1343, 1345 (1976). This Court reached the merits of the case and vacated the lower court's order without mentioning which writ it was granting. *Id*. at 704. This Court has the

[5] In *Vovos v. Grant*, this Court cited several cases regarding associational standing, and noted that the public defender for a county has a particularized interest in bringing challenges to unlawful court practices. 87 Wn.2d 697, 700, 555 P.2d 1343, 1345 (1976). By submitting this amicus brief, the Washington Association of Criminal Defense Lawyers, the Washington Defender Association and the King County Department of Public Defense express their support for the position taken by Mr. Pimentel and urge the Court to issue a writ in support of his claims.

authority to issue extraordinary writs to correct the unlawful practices and policies of lower courts, and should exercise that authority in this case.

CONCLUSION

The practice of issuing *ex parte* arrest warrants after the preliminary appearance hearing is harmful. It harms defendants through unnecessary incarceration. It harms our community by destabilizing vulnerable populations. It harms public trust in the fairness of the legal system because important decisions are made unilaterally and in secret.

Amici respectfully request that this Court keep these harms in mind when considering the legal arguments raised by the parties in this matter.

Respectfully submitted this 8th day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2020, I uploaded a PDF copy of this brief to the E-Portal of the Washington Supreme Court, thus causing it to be served on each of the attorneys of record in this case.

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