IN THE SUPREME COURT OF THE STATE OF NEVADA

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RICHARD JUSTIN,
dba JUSTIN BROS BAIL BONDS,
and INTERNATIONAL FIDELITY INSURANCE COMPANY,

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Tracie K. Lindeman
Clerk of Supreme Court

Petitioners,

vs. **Case No. 67786**

JANET J. BERRY, IN HER OFFICIAL CAPACITY AS DEPARTMENT 1 OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF NEVADA,

Respondent.

_____/

THE STATE OF NEVADA,

Real Party in Interest.

_____/

RESPONDENT JUDGE JANET J. BERRY'S ANSWER TO PETITION FOR WRIT OF MANDAMUS

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ATTORNEYS FOR RESPONDENT

Respondent, the Honorable Janet J. Berry, Judge of the Second Judicial District Court, hereby answers the petition for writ of mandamus, pursuant to the court's order of May 20, 2015.

I

Joinder in state's answer

Judge Berry hereby joins in the answer filed by the State of Nevada.

II

Background facts[1]

Norman Dupree is a repeat offender who was arrested in Washoe County on September 18, 2013. He was charged with multiple crimes, including:

(1) Failing to register as an ex-felon;

(2) Resisting a public officer;

(3) Possession of controlled substances (Schedule I, II, III and IV drugs);

(4) Possession of marijuana; and

(5) Selling Schedule I or II controlled substances, second offense.

Pet. appx. 1-3.

Despite the serious multiple charges against him, Dupree spent only one day in jail at that time, because Justin secured Dupree's release on bail by posting a $25,000 bail bond, Bond No. 1S30K-151744 (bond number 1). Resp. appx. 1-2.

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[1] NRAP 21(a)(4) requires a writ petition to be accompanied by an appendix. Petitioners (referred to collectively Justin) failed to comply. Instead, Justin has filed a packet of documents identified as "Exhibits." The exhibits have handwritten page numbers at the bottom. But neither the petition nor its supporting Memorandum of Points and Authorities provide citations or page references to the 110 pages of exhibits. To assist the court and its staff, Judge Berry's answer will provide actual page references when necessary; we will treat the petition's packet of exhibits as an appendix; and we will cite to the handwritten page numbers as "Pet. appx. __." The respondent is also submitting her own appendix, to which we will cite as "Resp. appx. __."

After Dupree was released back into the community as a result of the bail bond posted by Justin, the District Attorney filed formal felony charges. Resp. appx. 3-4. Dupree made his first court appearance for his arraignment on January 30, 2014, in the courtroom of respondent Judge Berry. Dupree was high on drugs. Judge Berry ordered him to be tested for drug use, and the test results were positive for cocaine and marijuana. Judge Berry therefore changed Dupree's status to "supervised bail," which meant that he would be supervised by Court Services. Pet. appx. 23, 90, 96.

At the hearing on January 30, 2014, Judge Berry rescheduled the arraignment to March 18, 2014, hoping that Dupree would appear clean and sober in court, and that he would remain drug-free prior to his arrangement. He did not. Instead, he was tested by Court Services the next day, January 31, 2014, and he was found to be heavily drugged and intoxicated. He was returned to custody in the Washoe County jail. Pet. 2-3. This was a Friday. Over the weekend he contacted another bail bond company, Bonafide Bail Bonds, and on Monday, February 3, 2014, Bonafide posted a bail bond (bond number 2) to secure Dupree's release back into the community again. Pet. appx. 3-4.

Dupree then failed to appear for his March 18, 2014 arraignment. Judge Berry therefore ordered both bail bonds (Justin's and Bonafide's) to be forfeited and a bench warrant to be issued, with new bail set at $50,000, cash only. Pet. appx. 90-95; Resp. appx. 6-7. On the same day, the clerk issued a notice of intent to forfeit bond number 1, and Judge Berry issued an order for forfeiture of bail. Pet. appx. 8-11. Both were served on Justin. Pet. appx. 9, 11.

Bonafide was able to obtain custody of Dupree, surrendering him to the Washoe County Sheriff's Office on May 14, 2014, at which point Bonafide's bond was exonerated. Pet. appx. 5, 24. Justin made no attempt to surrender bond number 1, which Justin knew or should have known was pending forfeiture

because Justin had received notice from the court advising that the bond was being forfeited.

Amazingly, on May 15, 2014, the very next day after Bonafide had surrendered Dupree into the sheriff's custody, Justin posted another bail bond for Dupree (bond number 3), in the amount of $20,000. Pet. appx. 6; Resp. appx. 8-9. (Apparently the sheriff's office had not been given correct information regarding Dupree's bail at that time.) This was Justin's bail bond IS30K-162345.[2]

When Justin posted bond number 3, Justin was fully aware, due to the prior notice of forfeiture of bond number 1, that Dupree had already skipped bail at least once, and that he had already failed to appear at a court hearing while out on bail.

Upon Dupree's release procured by Justin's bond, the sheriff's office provided him with written instructions to contact the court or his counsel to obtain the date of his next court appearance. Pet. appx. 24; Resp. appx. 10. Then, on May 27, 2014, a status hearing was held and the arraignment was set for June 10, 2014, allowing Dupree's counsel more than sufficient time in which to contact Dupree and arrange for his mandatory presence in court. Pet. appx. 24. But on the date of the rescheduled arraignment (i.e., the third date on which the arraignment was set), Dupree once again failed to appear. Pet. appx. 24-25, 89,

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[2] The writ petition papers are hopelessly confused regarding the bonds. The petition asserts that it is only seeking exoneration of Bond No. 1S30K-151744 (bond number 1). The petition is accompanied by a "Memorandum of Points and Authorities," which seeks exoneration of a different bond, No. 1S30K-162345 (bond number 3). Memorandum pp. 1-2, 7. Yet the exhibits accompanying the petition do not contain copies of either bond. Instead, the exhibits only provide this court with a copy of a Power of Attorney, which is not a bond, but which is merely a document that is attached to a bond. Pet. appx. 7. Even this Power of Attorney contained in the writ petition's exhibits does not relate to bond number 1, which is the target of the writ petition. It relates to the other bond, number 3.

94. At the June 10, 2014 hearing, another district judge (Judge Stiglich) issued a bench warrant for Dupree and ordered bond number 3 (posted by Justin) to be forfeited. *Id.* Once again, Justin was notified via certified mail that Dupree's bond would be forfeited. Pet. appx. 25.

Dupree once again failed to appear for yet another court hearing on July 22, 2014. Pet. appx. 89. Dupree's defense counsel stated that he attempted to make contact with Dupree via letter, to notify Dupree of the required court appearance. The letter was not returned, and counsel had no other communication with Dupree. *Id.*

On August 22, 2014, while Dupree was still evading law enforcement authorities, and more than five months after Justin was notified of the bail forfeiture, Justin filed a motion seeking exoneration of bond number 1. Pet. appx. 15. Justin's motion conceded that Justin "is in contact with the defendant [Dupree]" (emphasis added), and Justin assured the court that Dupree would surrender to law enforcement authorities. Pet. appx. 18. The District Attorney's office filed a response indicating no opposition. Pet. appx. 20. The response did not tell Judge Berry why there was no opposition to the motion; but at the same time, the response also did not indicate that the District Attorney actually believed the motion was meritorious. The response was essentially neutral.

Judge Berry carefully considered the motion to exonerate the bond, and she fully considered the facts and the applicable law. Although the motion was unopposed, Judge Berry was convinced that the motion had no merit and should be denied. On October 3, 2014, Judge Berry entered an order denying the motion. Pet. appx. 23-25. She explained, among other things, that Dupree had not appeared in court since January 30, 2014, and that Dupree's release on bail was

procured by Justin's posting of bond number 1.[3] *Id.* On October 6, 2014, Judge Berry entered a bail forfeiture judgment. Pet. appx. 27; Resp. appx. 11.

Justin then filed what was essentially a motion for reconsideration. Pet. appx. 29. Although the District Attorney did not file opposition, once again Judge Berry believed that the motion did not have merit and should be denied. On December 23, 2014, Judge Berry denied the motion, finding that Justin failed to present substantially different evidence or persuasive legal authority justifying reconsideration.[4] Pet. appx. 61-62.

Justin then hired a different attorney, who filed a third motion, this time seeking to declare the forfeiture unenforceable and to exonerate the bond. Pet. appx. 64. On March 10, 2015, Judge Berry denied the motion in a lengthy, detailed order. Pet. appx. 105-108. In the meantime, on February 6, 2015, Dupree entered a guilty plea on drug trafficking charges, and a separate plea on a charge of domestic battery by strangulation; he was given consecutive sentences in the Nevada State Prison. Resp. appx. 18-20.

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[3] Judge Berry's order also noted that Dupree was not in custody at that time. Pet. appx. 25. The order was entered six weeks after Justin had informed Judge Berry that Justin "is in contact with [Dupree]." During this six week time frame, Justin did not surrender Dupree to authorities. As it turned out, Dupree was not taken into custody until another month after the judge's order—which was nearly three months after Justin informed Judge Berry that Justin was in contact with Dupree. During the entire time in which Justin was in contact with Dupree, he remained at large in the community as a result of Justin's bail bond.

[4] Justin appealed, and this court dismissed the appeal for lack of jurisdiction. (Docket No. 67210).

III

ARGUMENT

A. Legal principles applicable regarding writs

The decision to entertain a petition for extraordinary relief is within this court's sole discretion. *Smith v. District Court,* 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

Petitioners seek a writ of mandamus. Pursuant to NRS 34.160, such a writ is only available "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." Here, the petitioners have failed to identify any act "which the law especially enjoins" that the district court failed to perform. Accordingly, mandamus is not available.

Mandamus may also be available to control a manifest abuse of discretion, where a district court has arbitrarily or capriciously exercised discretion. *State v. District Court (Armstrong)*, 127 Nev. ___, 267 P.3d 777, 779 (2011). A manifest abuse of discretion is a clearly erroneous interpretation of law, or a clearly erroneous application of a law or rule. *Id.* at ___, 267 P.3d at 780. In other words, a writ will not be issued to control a district court's ordinary discretionary action. Something much more is required. The abuse of discretion must be so serious and extreme that it can be characterized as a manifest abuse or an arbitrary or capricious abuse of discretion. See *Haley v. District Court,* 128 Nev. ___, 273 P.3d 855, 858 (2012).

B. Absence of opposition

Justin's writ petition asserts that two of Justin's district court motions were unopposed (although the third one was opposed). Neither the petition nor Justin's memorandum of legal authorities argues that there is any legal significance to the fact that the first two motions were unopposed. Nonetheless, this court's Order

Directing Answers notes the fact that Justin's motion to exonerate the bond was unopposed; and this court ordered Judge Berry to file a separate answer because of this fact. Thus, it appears that this court might perceive some legal significance to the fact that the motion was unopposed. There is no such significance.

Pursuant to District Court Rule 13(3), the failure of a party to file opposition to a motion "may" be considered by the district court to be an admission that the motion is meritorious. The word "may" is permissive and discretionary, not mandatory. See *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. __, 310 P.3d 560, 566 (2013) (it is well-settled that the word "may" is permissive, not mandatory). Thus, if a motion is unopposed, a district court has discretion regarding whether to determine that the motion is meritorious. *King v. Cartlidge*, 121 Nev. 926, 927, 124 P.3d 1161, 1162 (2005) (applying DCR 13(3)); see also *Las Vegas Fetish & Fantasy v. Ahern Rentals*, 124 Nev. 272, 277-78, 182 P.3d 764, 768 (2008) (applying EDCR 2.20(b); district court has discretion in deciding impact of party's failure to oppose motion).

No authority exists to support the contention that a trial court must grant an unopposed motion. *United States v. Campbell*, 711 F.2d 159, 160 (11th Cir. 1983) (noting lack of authority). A trial court has discretion to deny an unopposed motion if the court believes granting the motion would be contrary to the public interest. See *United States v. Fastow*, 300 F. Supp. 2d 479, 481 (S.D. Texas 2004).

Even if a motion is unopposed, a trial court surely must have discretion to deny the motion if the court believes the motion lacks merit. Indeed, Judge Berry respectfully contends that a trial court has a responsibility to deny an unopposed motion if the court believes it is without merit. By analogy, in the context of cross motions for summary judgment, where both parties agree that there are no genuine issues of fact, a district court still has the responsibility to examine the motions on their merits, and to determine if there are issues of fact that justify denial of the

motions. See *Cheqer, Inc. v. Painters & Decorators*, 98 Nev. 609, 612-13, 655 P.2d 996, 998 (1982).

In other words, a district court has the responsibility to decide a motion correctly, regardless of whether the motion is unopposed. Here, Judge Berry firmly and honestly believed—and still believes—that Justin's motion to exonerate bond number 1 was without merit, despite the District Attorney's failure to oppose the motion. Under these circumstances, Judge Berry was well within her discretion in declining to rule that the unopposed nature of the motion was somehow a binding factor in deciding the motion.

C. No automatic exoneration by operation of law

Justin's writ petition and his memorandum of law repeatedly contend that bond number 1 (1S30K-151744) was somehow automatically exonerated "by operation of law" when Dupree was remanded into custody in January of 2014. (E.g., Pet. at pp. 2-3; Memorandum at p. 3). Justin relies almost entirely on California cases such as *People v. International Fidelity Insurance Co.,* 138 Cal. Rptr.3d 883 (Cal. App. 2012). California case law is not binding in Nevada and is not applicable here. In *International Fidelity Insurance,* the California court relied on a very specific and applicable California statute dealing with bond exonerations by operation of law. *Id.* at 886-88. No similar Nevada statute exists.

Justin also cites *People v. Indiana Lumbermens Mutual Ins. Co.,* 231 P.3d 909, 916-17 (Cal. 2010) and *People v. Accredited Surety & Casualty Co.,* 138 Cal. Rptr.3d 370 (Cal. App. 2012), to support the assertion that the bond in this case was exonerated by operation of law. Again, these California cases rely on specific California statutes requiring a court to exonerate a bond on its own motion once a defendant has been remanded into custody. These statutes expressly create a vehicle for exoneration by operation of law, providing "[i]f the court fails to [order forfeiture of the bond to be vacated] on its own motion, then the surety's or

depositor's obligations under the bond shall be immediately vacated and the bond exonerated." *Indiana Lumbermens*, 231 P.3d at 911. California law disfavors forfeiture, but the California Supreme Court recognized: "The policy disfavoring forfeiture cannot overcome the plain intended meaning of [a] statute." *Id.* at 913.

Similarly, this court has recognized that a "district court may not exonerate a bond without a statutory basis for doing so." *All Star Bail Bonds Inc. v. District Court*, 130 Nev. __, 326 P.3d 1107, 1108 (2014). Nevada law does not provide a mechanism for exoneration of a bond as an operation of law, nor does Justin point to any Nevada statute or case authority supporting such a position.

The applicable statute, NRS 178.509(1)(a), provides that when a defendant fails to appear, "the court shall not exonerate the surety before the date of forfeiture" (emphasis added) unless enumerated statutory circumstances exist. In order for Justin to have its bond exonerated, one of following statutory conditions must have been satisfied:

> (a) The defendant appears before the court and the court, upon hearing the matter, determines that the defendant has presented a satisfactory excuse or that the surety did not in any way cause or aid the absence of the defendant; or
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> (b) The surety submits an application for exoneration on the ground that the defendant is unable to appear because the defendant:
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> (1) Is dead;
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> (2) Is ill;
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> (3) Is insane;
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> (4) Is being detained by civil or military authorities; or
>
> (5) Has been deported,

NRS 178.509(1)(a)-(b).

In *All Star Bail Bonds,* this court held that "under a plain reading of the text, NRS 178.509(1) prohibits courts from exonerating a bond for any other reasons" than those listed in the statute. 130 Nev. at __, 236 P.3d at 1110. The phrase "'[s]hall not' imposes a prohibition against acting." NRS 0.025(1)(f). "[T]he Legislature's use of 'shall' . . . demonstrates its intent to prohibit judicial discretion." *Otak Nevada, LLC v. Eighth Judicial District Court,* 127 Nev. __, 260 P.3d 408, 411 (2011).

Thus, the statute contemplates a two-step approach. First, the district court makes a factual/discretionary determination as to whether any of the statutory factors exist. Second, if the court does find that the factors exist, the court "may" exonerate the bond. NRS 178.509(2). But if the court does not find that the statutory factors exist, the court "shall not" exonerate the bond. NRS 178.509(1).

A review of the legislative history of NRS 178.509 reveals those in favor of adding "shall not" intended such language to preclude exoneration, stating "if there are no exonerating circumstances, then the bail should be forfeited and not set aside." Hearing on A.B. 808 Before the Assembly Commerce Comm., 60th Leg. (Nev, May 4, 1979). NRS 178.509 removed a court's discretion to exonerate bail in the absence of a finding that the statutory factors exist. As such, a plain reading of NRS 178.509 shows that there is no merit to Justin's argument that Judge Berry was required to find the bond exonerated by operation of law.

On January 31, 2014, when Dupree was remanded to into custody, he did not appear before the court, but was remanded based upon a pretrial supervision violation (using drugs). Thus, Justin was required to submit an application for exoneration on one of the enumerated statutory grounds. Upon review of Justin's eventual motion to exonerate the bond, Judge Berry did not determine that any of the statutory grounds existed. Pet. appx. 23-25. In the absence of a finding that

the statutory factors existed, Judge Berry was statutorily precluded from ordering exoneration.

As noted above, Justin's motion for exoneration expressly conceded that Justin was in contact with Dupree (and therefore could have surrendered Dupree within the statutory 180 days in order to possibly avoid the pending forfeiture). Justin did not surrender Dupree into custody, but instead told the court that Dupree would eventually surrender himself at some undetermined time after his child (his fourteenth child) was born. Pet. appx. 18. In determining that Justin failed to establish statutory factors for bond exoneration, Judge Berry's order expressly recognized Justin's concession.

Justin's subsequent motions did not present Judge Berry with persuasive legal authority for reconsideration or for post-judgment relief. The orders denying reconsideration and post-judgment relief were fully justified.

It is clearly unfortunate that Justin did not act upon the court's forfeiture notice of March 18, 2014, and that Justin did not surrender Dupree into custody when Justin was in contact with Dupree and had actual knowledge the bond was not exonerated and was pending forfeiture. Justin only has itself to blame for the bond forfeiture in these circumstances.

Judge Berry was well within her authority by denying Justin's motion to exonerate the bond. She did not fail to comply with any mandatory duty; nor did she manifestly abuse her discretion. Accordingly, a writ of mandamus is not available.[5]

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[5] It is entirely unclear whether the writ petition is challenging Judge Berry's two subsequent orders denying Justin's second and third motions. The judge denied the second motion because it failed to satisfy mandatory requirements for a motion for reconsideration. Pet. appx. 61-62. A judge's ruling on such a motion is discretionary. See *Gemini, Inc. v. Fertil*, 92 Nev. 183, 184-85, 547 P.2d 687, 687-88 (1976). Justin does not contend that Judge Berry's ruling was a (continued)

D. Dupree's conviction does not require retroactive exoneration of the bond.

Finally, Justin argues that bond number 1 was automatically exonerated by operation of law the moment Dupree was convicted, which was on February 6, 2015. (Memorandum at p. 6) But the primary district court order on which the writ petition is founded was the order of October 3, 2014, denying Justin's motion to exonerate the bond. At that time Dupree was not in custody and he had not been convicted. He was still on the lam. Indeed, the district court's order expressly observed that Dupree had not appeared in court since January 30, 2014, he had never been arraigned, and "to the Court's knowledge, [he] remains out of custody." Pet. Appx. at 25.

Even when Justin filed a motion for reconsideration, Dupree was still not in custody, and he had not yet been convicted. Pet. appx. 29. The conviction did not occur until after the district court had already denied Justin's motion to exonerate the bond, after judgment on the bond had been entered, and after Judge Berry had already denied Justin's motion for reconsideration.

Justin cites no Nevada authority for his contention that Dupree's conviction in February of 2015 wiped the slate clean and resulted in automatic retroactive exoneration of the bond—even though Dupree had missed multiple court appearances while on bail pursuant to Justin's bond prior to the conviction. Instead of citing Nevada law, Justin relies on *State v. French*, 945 P.2d 752, 756-

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(continued) manifest abuse of discretion. The third motion was primarily a regurgitation of arguments made in the first two motions. The only thing new was the fact that Dupree was finally in custody at that time, after having missed numerous court appearances during the preceding months. But by that time the bond had already been forfeited, and Judge Berry's order fully explained why the third motion was without merit. There is no independent basis for granting a writ on the third order.

57 (Wash. App. 1997), for the proposition that a trial court "cannot lawfully bind a surety to a bail bond when the accused has been convicted." (Memorandum at p. 6) *French* is not even remotely applicable here.

French was a unique case in which a bail bondsman was arrested, and he posted a pretrial bail bond from his own company. He attended all of his court hearings, including his trial. After he was convicted, he requested the judge to allow the pretrial bond to constitute security for post-conviction bail. The judge took the request under submission, and the defendant was not taken into custody. The court characterized the defendant's post-conviction status at that time as not being out on bail, but rather, as being "on personal recognizance and nothing more." *Id.* at 757. The defendant failed to appear for the next hearing, and the trial judge refused to exonerate the bond.

The *French* court reversed. But the reversal was based entirely on a Washington statute that states: "Any bail bond that was posted on behalf of a defendant shall, upon the defendant's conviction, be exonerated." *Id.* at 755. The court observed that the "plain language of the statute" required the bond to be exonerated by operation of law at the moment of conviction. *Id.* at 756.

Additionally, the *French* court observed that there is a significant difference between bail before a conviction and bail after a conviction. There are vastly different motivations and policy considerations (such as the increased risk of flight in the post-conviction setting) in the two situations. *Id.* The defendant in *French* had appeared in court every time he was required to do so before his conviction, thereby completely satisfying all pre-conviction bail requirements. His only failure to appear occurred after his conviction. By that time the bond was already exonerated, pursuant to the Washington statute. In that highly unusual situation, the *French* court applied the plain language of the statute, and the court exonerated the pretrial bond.

It is readily apparent that *French* has no applicable here. There is no Nevada statute similar to the Washington statute. Moreover, the bond in this case was forfeited, and Judge Berry denied the motion to exonerate the bond, long before Dupree was ever convicted. No law supports Justin's contention that the conviction somehow retroactively vacated the prior forfeiture.

If this court accepts Justin's contention that Dupree's conviction in February 2015 had the effect of exonerating the bail bond, the court's decision will have enormous adverse implications. Bail bond companies would have little incentive to keep track of defendants and to assure that defendants appear in court when required. Such companies would know that if defendants are eventually captured and convicted some day in the future, the bonds will be exonerated even if the defendants have missed multiple court appearances in the meantime, and even if the bail bond companies have received court notices of forfeiture. Sound public policy surely does not support such a result.[6]

CONCLUSION

Justin posted a bail bond, essentially assuring the court and the community that Dupree—who was facing multiple felony charges—would appear in court for his criminal proceedings. Dupree failed to appear on numerous occasions, despite

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[6] Similarly, Justin's argument that the bond was previously exonerated by operation of law, as discussed above, is also contrary to sound public policy. Bail bond companies should have incentives to ensure that their clients (criminal defendants) appear in court when required. Justin's argument that Nevada law somehow recognizes authomatic bond exoneration would take away incentives to ensure court appearances by criminal defendants. Here, Dupree failed to appear in court on numerous occasions. Yet Justin apparently believed its bond was exonerated by operation of law, and Justin perceived no real reason to apprehend Dupree and deliver him to law enforcement authorities, even though Justin was in contact with him. Public policy should not encourage such conduct by a bail bond company.

the fact that Justin was in contact with Dupree during much of the time when Dupree was on the lam. Under these circumstances, Judge Berry applied Nevada statutes correctly, and she was fully justified in ruling that bond number 1 was forfeited. Accordingly, the petition should be denied.

DATED: June 15, 2015

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date Respondent's Answer to Petition for Writ of Mandamus and Appendix were filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Richard Cornell
Terrence McCarthy
Adam Laxalt
Keith Munro

I further certify that on this date I served copies of this Answer and Appendix, postage prepaid, by U.S. Mail to:

Honorable Janet J. Berry
Department One
Second Judicial District Court
75 Court Street
Reno, Nevada 89501

DATED: 6/15/15

Vicki Shapiro, Assistant to
ROBERT L. EISENBERG