**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

**CASE NO. 67786**

Petitioners,

v.

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,

Respondent.
_____/

## PETITION FOR REHEARING

COME NOW, Petitioners, Richard Justin dba Justin Bros. Bail Bonds and International Fidelity Insurance Company, and respectfully petition for a rehearing of 132 Nev. Ad. Op. 47, filed June 30, 2016.

The within Petition is brought pursuant to NRAP 40(a)(2), and is based

upon points of law which Petitioners believe the Court has overlooked or misapprehended.

DATED this 15 day of July, 2016.

Respectfully submitted,

LAW OFFICES OF RICHARD F. CORNELL
150 Ridge Street, Second Floor
Reno, NV 89501

By: _____
Richard F. Cornell

**MEMORANDUM OF POINTS AND AUTHORITIES**

The holding of Advanced Opinion 47 is that NRS 178.509's plain language does not espouse an intent for automatic exoneration of a surety bond when a defendant is remanded to custody or convicted.

Petitioners do not disagree, but that never has been their point. As made very clear at page 3 and pages 8-11 of the Reply filed herein on or about June 22, 2015, as well as to Judge Berry as PA: at 72, the governing statute is **NRS 178.522**.

Sadly, Advanced Opinion 47 mentions the statute only in passing. This above all is why rehearing must be granted. The result cannot be squared with the duties that the statute imposes on the State and on the court.

NRS 178.522, which along with NRS 178.509 is part of the bail section of NRS ch. 178, provides:

> 1. **When the condition of the bond has been satisfied** or the forfeiture thereof has been set aside or remitted, **the court shall exonerate the obligors and release any bail.** The court shall exonerate the obligors and release any bail at the time of sentencing the defendant, **if the court has not previously done so** unless the money deposited by the defendant as bail must be applied to satisfy a judgment pursuant to NRS 178.528.
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> 2. A surety may be exonerated by a deposit of cash in the amount of the bond **or by a timely surrender of the defendant into custody.**

To reach the result of denying the Petition, this Court must explain why this statute does not apply when a defendant has actually been remanded into custody after making his scheduled court appearances. And, the Court must explain why - contrary to how bail law has been practiced in Nevada for 151 years[1] - NRS 178.522(1) "requires" a motion to exonerate which the court has no discretion to deny. The Court must explain the "sound public policy" in creating needless "busy work" for bondsmen, the State and the court. This Court has yet to do so, and cannot do so. Here is why:

After Petitioners posted the within $25,000.00 bond, Dupree was released to the constructive custody of Justin Bros. Dupree was required to appear for his

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[1]See: for example: NRS 31.580 re. extraordinary civil remedies, in existence since the days of the Nevada Compiled Laws.

arraignment on January 30, 2014. He complied. The arraignment was continued to March 18, 2014, and Dupree was required to comply with the order of pre-trial services. Once again, Dupree complied; he showed up. Dupree's problem was that the court had imposed a "no drugs" condition of bail, and he tested dirty. I.e., these Petitioners did not impose that condition of bail; the court did. When Dupree tested dirty and Dupree appeared on January 31, 2014, Respondent remanded Dupree to the Washoe County Sheriff. I.e., Dupree's supervised bail thereafter was revoked due to his failure to stay "clean". Please see: Para. III of the Original Petition.

NRS 178.509 applies to exoneration of a surety before a date of forfeiture, when a defendant fails to appear and his attendance in court is lawfully required. See: NRS 178.509(1). But that statute does not apply as of January 31, 2014, because *as of that date Dupree had not failed to appear*! After Petitioners bailed him, Respondent remanded Dupree into custody for other reasons. As such, NRS 178.522 applies.

Based upon NRS 178.522(1), the controversy between these parties was over. **Everything that happened after January 31, 2014 ultimately is irrelevant**. The conditions of the bond were satisfied. The face of the Bond did not require Petitioners to do more than they did. Obviously, Petitioners had

nothing to do with Dupree's decision to use drugs, contrary to the court's prior bail order. Once Respondent remanded Dupree into custody in January of 2014, Respondent had no discretion but to exonerate the bond under NRS 178.522(1). But Respondent forgot to do so. Thus, from that date forward, the bond at bar was void; ergo, the forfeiture based on the void bond was also void.

Truly, everything stated above is all that Advanced Opinion 47 needed to say. Based thereon, granting the Petition is the only proper result.

But, if the Court is not yet convinced, the Court must understand this point: Bonafide later bailed Dupree on the same $20,000.00 sales of controlled substance charge that Justin Bros. had bailed him on, before Dupree was placed into custody. That amount was not raised to $45,000, it remained at $20,000. The reason for the $5,000 discrepancy viz. The Petitioners' bond was relative to a charge that had already been resolved in justice court by the time Bonafide posted its bond. I.e., **Respondent did not intend to stack the bonds; it intended to replace the bonds**. The Order to Appear thereafter was relevant to Bonafide, not Justin Bros. Suretyship transferred from these Petitioners to Bonafide and its surety. How can the court "forfeit" a replaced bond? Ad. Op. 47 does not say; but the concept makes no sense!

We assume these facts do not matter to the Court since it created a duty to

file a motion to exonerate. But it begs the question: Why was Bonafide exonerated but not Justin Bros? Based on the authorities in the below footnote no. 2, it makes no sense! The failure to exonerate these Petitioners clearly was a clerical error by the clerk on January 31, 2014, which is a correctable error now per NRS 176.565.

But even more pointedly, the question is: Where is the duty to file a motion to exonerate located expressly in either the bond itself or in the relevant statutes? The answer is: *Nowhere.* The Court created that duty by Advanced Opinion 47, then applied it retroactively to Petitioners - but only to the Petitioners.

A bail bond is a contract between the government and the surety. The surety's liability is limited to the terms of the contract. See: County of Los Angeles v. American Contractors Indemnity Company, (2011) 198 Cal. App. 4th 175, 178-79, 129 Cal. Rptr.3d 563, 565. In determining whether bail is exonerated, the issue is whether the surety did all that was required of it under the terms of the bond. People v. Far West Insurance Company, (2001) 93 Cal. App. 4th 791, 796-97, 113 Cal. Rptr.2d 448, 450-51.

The response of the Court ignores all of that and holds that a motion was required per NRS 178.509. But when exoneration is mandatory per NRS 178.522(1), creating that condition, not heretofore set forth by the legislature,

violates basic principles of surety law, as well stated in Far West:

> "The object of bail and its forfeiture is to insure the attendance of the accused and his obedience to the orders and judgment of the court. In matters of this kind there should be no element of revenue to the state nor punishment of the surety. [cite omitted] Following the Anglo American legal maxim that "equity abhors a forfeiture," the law "traditionally disfavors forfeitures and statutes imposing them are to be strictly construed." [cite omitted] This rules applies to the forfeiture of surety bonds. [cite omitted] The other canon of legal interpretation pertinent here is the rule prescribing the commonsense construction of statute so as to avoid absurd results. [cites omitted] The principle is that these penal code sections must be strictly construed in favor of the surety to avoid the harsh results of a forfeiture. Nor will we blindly follow the literal meaning of every word if to do so would frustrate the legislative purpose of those words. As another court has said in interpreting the same section, a statute will not be given an interpretation in conflict with its clear purpose, and general words use therein will be given a restricted meaning when reason and justice require it, rather than a literal meaning which would lead to an unjust and absurd consequence."
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> 93 Cal. App. 4th at 794-95, 113 Cal. Rptr.2d at 450-51.

The above quote is not unique to California; those principles were set forth at pp. 1-2 of the Reply filed on June 22, 2015, with cites to Nevada law. But the Court did not discuss them, either - and needs to do so, in order to reach the correct result.

The parties and the Court agree that if our facts were before the California Court of Appeals, exoneration would be the only proper result pursuant to People v. International Fidelity Insurance Company, 138 Cal. Rptr.3d 883, 886-87 (Cal.

App. 2012). However, this Court distinguishes that case because "California law is different than Nevada law."

That raises the question: Is it really? And the answer is: "No" - not for the situation at bar.

Petitioners will concede that California Penal Code §1305(c)(1) makes it absolutely, unmistakably clear that when a defendant is placed into custody, the court shall, on its own motion, vacate any order of forfeiture and exonerate the bond; and if the court fails to act on its own motion, then the surety's or depositor's obligations under the bond shall be immediately vacated and the bond exonerated. The Nevada statutes do not spell it out quite as clearly as that. However, California Penal §1305(c)(1) was enacted in 1994. See: Stats. 1994, Chapter 649, AB 3059. All that the amended statute really did was make clear what California common law and decisional law had already long-since proscribed and prescribed.

In International Fidelity, the California Court of Appeals cited to California Penal Code §1305(c)(1) in explaining why exoneration had to be the order of the day. However, the Court also cited to Kiperman v. Klenshetyn, (2005) 133 Cal. App. 4th 934, 939, 35 Cal. Rptr. 3d 178, 182 (Cal. App. 2005), which stated the common law, commonsense reason for exoneration:

> "Once bail was raised to a figure greater than the amount posted, the trial court had no choice but to remand the defendant, because a person may not be released on bond for an amount less than the amount of the bail ordered by the cour.t [cite omitted] Upon remand of the defendant because of the higher bail, the first bond in the amount of $250,000.00 **was exonerated by operation of law. This is so because the responsibilities of a surety are based upon the surety's custody of the person bailed** (People v. McReynolds, (1894) 102 Cal. 308, 311-12, 36 P.590), and [the surety] could no longer have custody over the defendant who had been remanded."
>
> Kiperman, 35 Cal. Rptr.3d at 182.

The citation to McReynolds is most illuminating. There, the defendant was placed into custody of the county jail, and then escaped. The question is whether the surety could be held responsible for the amount of bail, when the bond had not technically been exonerated. The California Supreme Court held in the negative. As the California Supreme Court noted in the 19th Century, once the defendant is remanded to the custody of the sheriff, it makes no difference whether he is there for 10 minutes or 10 months; the surety is released from any further care as to his whereabouts.

Had Dupree theoretically escaped after being put into the custody, this Court's Advanced Opinion 47 would have been contrary to the 19th Century Opinion of the California Supreme Court. This Court would have held that because that surety did not technically take the step of filing a motion to exonerate, a motion which the district court would have had no discretion but to

grant, equity be damned - he assumes the risk of his former bailee's subsequent escape, and *ergo*, he loses. All should agree that would be an absurd result. Yet, that is the result dictated by Advanced Opinion 47![2]

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[2]On that subject, because the law seemed so clear to the Petitioners and to the undersigned, it was not mentioned in the Petition that after Dupree skipped bond on the Bonafide bond, it was actually Petitioners who caused Dupree to be turned into Bonafide, who then turned Dupree into the county jail. Justin Bros did that as a courtesy to Bonafide because it was Bonafide's job at that point, not Justin Bros.', to do so. After that, when Dupree skipped on Bonafide's bond again, he called Justin - not Bonafide - and said he would turn himself in. Dupree attempted to do so on May 14. (Not in March) It would not have mattered who would have accompanied him on that date; the jail would not have taken him because of the mistake of not entering the $50,000 cash only warrant into the warrant system. Contrarily, had the cash only warrant from nearly two months prior been placed into NCIC by May 14, 2014, Dupree would have been placed into custody and this case would not have been here. So "the implicit holding" of Advanced Opinion 47 is Justin Bros - but not Bonafide - bears the risk of loss of the Real Party's or Respondent's mistake.

I.e., the Court's comment on page 10 of Advanced Opinion 37 regarding "aiding and abetting" is factually 100% wrong. This court has needlessly impugned the integrity of a long-time ethical bondsman! In fairness to the Court, we did not advise the Court or Respondent of those facts.

But the reason we did not mention them is because the question of whether and to what degree the surety caused the defendant to be put into custody is *irrelevant*. See: People v. United Bonding Insurance Co., (1966) 240 Cal. App.2d 895, 896, 50 Cal. Rptr. 198, 199-200. Exoneration does *not* depend on the "clean hands" of the surety, so long as the surety does not "connive" with the defendant relative to his failure to appear. County of Los Angeles v. Financial Casualty & Surety, Inc., (2013) 216 Cal. App. 4th 1192, 1195-96, 157 Cal. Rptr.3d 448, 449-50.

But actually, it doesn't matter under Advanced Opinion 47, either. Because Petitioners did not file a motion to exonerate that the trial court would have had no discretion but to grant had they filed it after January 30, 2014, Bonafide wins and Justin

The bottom line is that the requirement of an independent motion - something that has never previously been required of any Nevada bondsman or surety - makes no sense in the light of the statutory words "the court shall exonerate the obligors and release any bail." Why should a bondsman and the surety be required to file a motion that the district court has no discretion but to grant? That has never been required in 151 years in Nevada; why now? If the legislature had set forth that requirement in the statute, that would be one thing; but the legislature has not.

Since the Court deemed the situation worthy of a published opinion, it should grant the Petition for Rehearing, withdraw Advanced Opinion 47, and rule this way in a new Advanced Opinion:

1. In a true NRS 178.509 situation - i.e., not our situation - when a defendant fails to appear and subsequently is placed into custody, the bondsmen must file a motion to exonerate in order to exonerate the previously posted bail bond. In that situation, California law does not apply.

2. But where a defendant is placed into custody for reasons other than

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Bros. loses.

So, the law in California is: Exoneration is automatic. The law in Nevada is: No good deed goes unpunished!

nonappearance - i.e., our situation - NRS 178.522(1) applies. Under that statute exoneration is mandatory, and the bondsmen need not file a motion in order to obtain exoneration. In that situation, California common law is perfectly congruent with Nevada, and therefore applicable.

3. There should be no reference whatsoever re. Justin Bros. "aiding and abetting" Dupree's nonappearance. The charge is factually wrong and legally irrelevant. Impugning the integrity of this bondsman is completely unwarranted to the proper legal result herein.

DATED this 15 day of July, 2016.

Respectfully submitted,

LAW OFFICES OF RICHARD F. CORNELL
150 Ridge Street, Second Floor
Reno, NV 89501

By: _____
Richard F. Cornell

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THE STATE OF NEVADA,

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_____/

## ATTORNEY'S CERTIFICATE

I, RICHARD F. CORNELL, hereby certify as follows, pursuant to NRAP 28A, and NRAP 32(a)(8):

I have read this Petition for Rehearing before signing it; to the best of my knowledge, information and belief, the Petition is not frivolous or interposed for

any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

The Petition complies with all applicable Nevada Rules of Appellate Procedure, including the requirements of NRAP 28(e) that every factual assertion in the petition regarding matters in the record is supported by appropriate references to the record on appeal.

Further, I certify that the document complies with the formatting requirements of Rule 32(a)(4)-(6). Specifically, the brief is 2.0-spaced; it uses a mono-spaced type face which is Times New Roman14-point; it is in a plain style; and the margins on all four sides are at least one (1)inch.

The Petition also meets the applicable page limitation of Rule 40(b)(3), because it contains less than 4,667 words, to wit: 2,808.

**DATED** this 15 day of July, 2016.

Richard F. Cornell

## CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of LAW OFFICES OF RICHARD F. CORNELL, and that on this date I caused a true and correct copy of the foregoing document to be delivered by Reno Carson Messenger Service, addressed to:

Keith Munro
Washoe County District Attorney's Office
Civil Division
One S. Sierra St., 7th Floor
Reno, NV 89501

Robert Eisenberg, Esq.
Lemons, Grundy & Eisenberg
6005 Plumas St., 3rd Floor
Reno, NV 89519

**DATED** this 5th day of July, 2016.

Marianne Tom
Legal Assistant