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,

Real Party in Interest.
_____/

PETITION FOR *EN BANC* RECONSIDERATION

COME NOW, Petitioners, Richard Justin dba Justin Bros. Bail Bonds and International Fidelity Insurance Company, and respectfully petitions the entire Court *en banc* for reconsideration of 132 Nev. Ad. Op. 47, filed June 30, 2016 and the Order Denying Rehearing filed September 22, 2016.

The within Petition is brought pursuant to NRAP 40A(a), and is based upon the assertion that this case involves a substantial precedential issue that affects surety bonds and the practice of bail statewide. Specifically, the practical effect of Ad. Op. 47 is to require motions to exonerate on appearance bonds, relative to exonerations that should occur by operation of law, and grant discretion to district courts to create forfeitures where the bondsmen do not have constructive custody over the accused bailees. This has never been how bail has been practiced in (northern) Nevada. Therefore, the entire Court needs to decide this issue.

DATED this 3rd day of October, 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 is not their point here. 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.**[1]

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[1]In the Answer to the Petition for Rehearing filed jointly by Respondent and Real Party in Interest ("The Opposing Parties") on August 5, 2016, they scold Petitioners for the tone of the Petition for Rehearing and not "following appellate procedure rules." But in the Reply to the Answer filed June 22, 2015 at pp. 14-15 (incorporated herein) we point out this Court's authorities, to the effect that the rules governing what can and cannot be argued in an original writ proceeding reviewing a district court's nonappealable order are subtly but distinctly different than what can and cannot be argued on direct appeal. A party cannot take a position that he waived to the respondent below, and he cannot take a position that requires the respondent to have made additional findings of fact. But he can cite and argue a statute that controls the respondent's exercise of discretion - even if he did not do so before the respondent, or did so "only in passing."

Here, it is undisputed that Petitioner argued NRS 178.522 to Respondent before filing this Petition, albeit in a motion filed after the Order Denying the Motion to Exonerate and Entry of Bail Forfeiture Judgment. Nevertheless, NRS 178.522 was squarely before Respondent at PA: 72 before Petitioner filed the within Petition.

Many things about this case profoundly bother Petitioners. One thing is that at the time Respondent denied the post-judgment motions and at the time this Court entered Ad. Op. 47, Norman Dupree (the bailee) was and is serving a prison sentence because these Petitioners delivered him into custody in early November of 2014. (See: PA: 80-96) That fact was before Respondent. How, in light of NRS 353.115, can the Court justify a forfeiture when we know the person previously bailed has been brought to justice before this petition was even filed? Although Petitioners pointed this out to The Opposing Parties at pp. 12-13 of the June 22, 2015 Reply, together with AGO 96-05 attached to the Reply, the point has been ignored. Why?

Perhaps even more bothersome to Petitioners is that, in the face of the facts, the State's initial response was not to object to exoneration. (PA: 21) And even post-judgment the State did not "shift positions." (PA: 100) Now, the State has joined forces with Respondent and dramatically shifted positions. Based on Ad. Op. 47, the State has gotten away with it! Why? Why does the State get to do that but the Petitioners don't? Ad. Op. 47 does not explain.

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.
>
> 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 (northern) Nevada for 151 years[2] - 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, in order to avoid a "possible" forfeiture. That has never been required until Ad. Op. 47. This Court

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[2]See: NRS 31.580, derived from the NCL re extraordinary civil remedies.

has yet to explain 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 arraignment on January 30, 2014. He complied to that point. (See: PA 96) 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 to that point; 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, the court (Respondent, through Judge Hardy. See: PA 3, 96) 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.[3]

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[3]In other words, the Opposing Parties have the facts wrong, not Petitioners. Dupree indeed failed to appear - after January 31, 2014. That fact had a potential impact on Bonafide's subsequent bond and Petitioners' subsequent bond, IS30K-162345. It is irrelevant to this bond, IS30K-151744. (See: PA: 10) And given that both Bonafide's subsequent bond and Petitioner's subsequent bond were exonerated, how does that square with forfeiting this bond? Ad. Op. 47 does not explain.

These facts are paramount in traversing The Opposing Parties' primary point at pp. 14-16 of their Answer. Justin Bros indeed cannot and do not dispute there was a breach in a condition of bail - in terms of non-appearance, after January 31, 2014 relative to the two subsequent bonds; but in terms of a court-imposed condition not

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**. This was an appearance bond only. The conditions of this bond were satisfied. The face of this 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, there was nothing more for Petitioners to do on this bond, IS30K-151749. Thus, Respondent had no discretion but to exonerate this 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

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appearing in this bond, on January 31, 2014. Again, neither this Court in Ad. Op. 47 nor really The Opposing Parties squarely address the issue: When the defendant is remanded in to custody for reasons other than non-appearance, why doesn't NRS 178.522(1) mandate the exoneration of an appearance 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. (See: PA: 3-4) 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. (See: PA: 14)

I.e., **Respondent did not intend to stack the bonds; it intended to replace the bonds**. (See: PA: 5) 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? It was impossible to forfeit $45,000 of bail after March 18, 2014, when Respondent set the bail at $20,000 on January 31, 2014. (See: PA: 3-4) Ad. Op. 47 does not discuss these points.

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 ultimately

exonerated but not Justin Bros? 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 prior to filing a Notice of Intent to Forfeit filed located expressly in either the bond itself or in the relevant statutes? The answer is: *Nowhere.*[4] 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 pre-notice motion was required per NRS 178.509. But when exoneration is mandatory per

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[4]It is undisputed that Petitioners filed a Motion for Exoneration after the Notice of Intent to Forfeit was filed (PA: 15-19) - a motion which Real Party did not oppose. (PA 20-22)

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 Ad. Op. 47 did not discuss them, either.

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 Code §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."
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> Kiperman, 35 Cal. Rptr.3d at 182.[5]

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

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[5]"Facts can be devastating things," say The Opposing Parties at p.11 of their Answer, to which Petitioners rejoin: "And governing law even more so." Nowhere in IS30K-151744 does it require that not only must the defendant be remanded into custody, but the presiding judge must see "the whites of his eyes" while the defendant is in custody, before the exoneration may happen. (See: PA: 7) (form bond)) And nowhere in NRS ch.178 does it say that, either. But the above quoted law is plainly inconsistent with such a requirement. Again, the question is simple: Once the defendant/bailee is remanded into custody on an appearance bond, what else is the bondsman supposed to do? Until Ad. Op. 47, the answer was straight forward: Nothing. Exoneration happens by operation of law.

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![6]

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[6]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 (See: PA: 5–7; 16-17)) 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.

The reason we did not mention these facts 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

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, 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.

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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. Clearly, these bondsmen did not "connive."

2. But where a defendant is placed into custody for reasons other than nonappearance - i.e., our situation in January of 2014 - NRS 178.522(1) applies. Under that statute exoneration is mandatory, and the bondsmen need not file a motion in order to obtain exoneration of an appearance bond. In that situation, California common law is perfectly congruent with Nevada, and therefore applicable.

DATED this 3rd day of October, 2016.

Respectfully submitted,

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

By: _____
Richard F. Cornell

IN THE SUPREME COURT OF THE STATE OF NEVADA

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RICHARD JUSTIN,
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JANET J. BERRY, IN HER OFFICIAL
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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 *En Banc* Reconsideration 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 40A(d), because it contains less than 4,667 words, to wit: 3,506.

DATED this 3rd day of October, 2016.

Richard F. Cornell,
Attorney for Appellant

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:

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DATED this 3rd day of October, 2016.

Marianne Tom
Marianne Tom
Legal Assistant