

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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Elizabeth A. Brown
Clerk of Supreme Court

Petitioners,

vs.

THE SECOND JUDICIAL
DISTRICT COURT OF THE STATE
OF NEVADA, IN AND FOR THE
COUNTY OF WASHOE; AND THE
HONORABLE JANET BERRY,
DISTRICT JUDGE,

Case No. 67786

Respondents,

_____ /

THE STATE OF NEVADA,

Real Party in Interest.

_____ /

ANSWER TO PETITION FOR EN BANC RECONSIDERATION

Respondents, the Second Judicial District Court and the Hon. Judge Janet J. Berry, and Real Party in Interest, the State of Nevada, answer the petition for en banc reconsideration. This answer is made and based upon the attached points and authorities and all other pleadings, papers, and exhibits on file in the above-entitled matter.

This case presents an issue of statutory interpretation, namely, whether provisions of NRS Chapter 178 required the district court to exonerate Justin Bros' bail bond. The district court applied the law governing bail proceedings and denied each of the three separate motions to exonerate filed by Justin Bros. This Court's panel subsequently denied a petition for writ of mandamus, concluding that NRS 178.509 was the controlling statutory provision and that Justin Bros failed to meet the requirements of the provision.

In denying the writ petition, this Court held that, "the district court would have abused its discretion by proceeding to exonerate Justin Bros' bond." *Justin Bros v. Second Judicial Dist. Ct*, 132 Nev. Adv. Op. 47, at p.10 (2016). This Court summarily denied a petition for rehearing. In the petition for en banc reconsideration, Justin Bros again raises its untimely argument that NRS 178.522 requires this Court to exonerate its bail bond. This argument was not properly presented in the district court or in this Court. This argument was not timely presented to the district court and was not argued until the reply brief in the writ proceeding before this Court. Even so, NRS 178.522 does not apply to this case, and doing so in the manner argued by Justin Bros, would create precedent that would disrupt ancillary bail proceedings in this State.

Justin Bros alleges that the "practical effect" of this Court's decision creates a new requirement that a "motion to exonerate" must be filed before every bail

bond can be exonerated. The argument is baseless. Justin Bros makes no explanation and points to no portion of the decision to support how such a requirement was created by this Court's decision.

Justin Bros' reading of this Court's decision is flawed. This case was resolved upon the application of a single statutory provision, NRS 178.509, to the undisputed facts of this case. The bail provisions within NRS Chapter 178 can and should continue to be applied as they always have been in bail proceedings. Whether a motion to exonerate a bail bond should be filed in a particular case should be governed by the existing and well-defined bail provisions within NRS Chapter 178. The petition for en banc reconsideration should be denied.

ARGUMENT

A. Introduction

A bail bond is a contract between the State and the surety of the accused. *All Star Bonding v. State*, 119 Nev. 47, 49, 63 P.3d 1124, 1125 (2003). The statutes governing bail bonds are incorporated into the bail agreement of the parties. *All Star Bail Bond, Inc. v. Eighth Judicial District Courts*, 130 Nev. Adv. Op. 45, 326 P.3d 1107, 1110 (2014). The Nevada Legislature places the trust in district court judges to administer the ancillary bail process in their courtrooms so as to ensure a criminal defendant answers the pending criminal charge.

A district court has the discretion to set reasonable bail conditions before releasing a person on bail. *State v. Second Judicial District Court*, 121 Nev. 413, 419, 116 P.3d 834, 838 (2005). A district court may release a criminal defendant without bail. NRS 178.4851. If bail is necessary, a district court can set an amount for bail which will reasonably ensure the appearance of the defendant and the safety of the community. NRS 178.498. After determining the amount of bail, a district court then can increase the amount of bail if necessary. NRS 178.499. Pursuant to NRS 178.502(2)(b), after a bail bond is posted, the bond “remains in effect until exonerated by the Court.”

A district court determines if the conditions of a bail bond have been satisfied. If the court concludes the conditions have not been satisfied, the court “shall declare” a breach of the conditions of the bond. NRS 178.506. A district court is then required to follow the requirements set forth in NRS 178.508 and 178.509 for filing a notice of intent to forfeit a bond, entering a forfeiture judgment, or potentially exonerating the bond. After a date of forfeiture has been established, a district court may extend the date of forfeiture. NRS 178.508(3). However, once a breach has been declared, there are strict limitations in granting bail exonerations. *All Star Bail Bond*, 326 P.3d at 1110.

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B. Statement of Facts

The factual history set forth by this Court, in the FACTS section of the Advance Opinion, is adopted. A summary of those facts is presented to assist this Court in considering the petition for en banc reconsideration.

Justin Bros posted a bail bond for the criminally charged defendant in district court. After the defendant breached the conditions of his bail, the district court filed a notice of intent to forfeit the bail bond. Justin Bros attempted three times to have its bail bond exonerated by the district court but was unsuccessful each time. Justin Bros' petition for writ of mandamus challenging those rulings was denied by this Court and a petition for rehearing was summarily denied.

One important fact should be highlighted for this Court in considering the petition for en banc reconsideration. This Court's panel, in denying the writ petition, made the following factual finding, "[t]hus, according to the undisputed facts, and in contrast to Justin Bros' argument, the district court would have abused its discretion by proceeding to exonerate Justin Bros' bond." *Justin Bros v. Second Judicial Dist. Ct*, 132 Nev., Adv. Op. 47, at p.10 (2016). This fact is accurate and compelling. This Court made a dispositive factual determination that the district court would have abused its discretion if it had ruled in favor of Justin Bros.

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C. Statement of the Case

The procedural history set forth by this Court, in the FACTS section of the Advance Opinion, is adopted. A procedural aspect is highlighted for the Court in considering the reconsideration petition. Justin Bros has shifted legal theories in desperate hopes of obtaining relief by presenting an argument outside the petition for writ of mandamus. This Court should reject this effort to litigate what is really nothing more than a second petition for writ of mandamus.

In the district court, Justin Bros filed a motion to exonerate the bond. The motion never discussed or even cited NRS 178.522. Pet. Appx. 15-18. When the district judge denied the motion, Justin Bros filed a second motion to exonerate, which was presented as a motion for reconsideration. The motion's primary statutory focus was NRS 178.509 (which is the statute on which this Court's opinion relied). Pet. Appx. 35-39. The motion again never cited NRS 178.522. *Id.* Justin Bros filed a reply in support of its reconsideration motion, and again, it did not cite or discuss NRS 178.522. Pet. Appx. 57-58.

Then, Justin Bros filed a third motion requesting exoneration of the bond. Pet. Appx. 64. This motion cited NRS 178.522 for the first time, but even then only in passing, buried with a list of other statutes. Pet. Appx. 71-76. Accordingly, in the entire district court record, Justin Bros only cited NRS 178.522

once; and even then, it was cited in passing, with no analysis or meaningful discussion.

After the district court denied relief, Justin Bros sought a writ from this Court. Notably, the writ petition only mentions NRS 178.522 in passing and even more notably, the points and authorities submitted by Justin Bros in support of the writ petition only cited NRS 178.522 in passing, one time (at page 3), and even then, the statute was merely cited within a list of five statutes lumped together and quoted in the points and authorities. Although the statute was more thoroughly discussed for the first time in Justin Bros reply, this Court's opinion can hardly be faulted for mentioning the statute only "in passing." Pet. at 4 (Petition scolds Court because panel's opinion "mentions the statute only in passing"). And, if the fact that the opinion mentioned the statute only "in passing" is "above all" why rehearing is being sought (as the petition for en banc reconsideration states at p. 4), then en banc reconsideration should be summarily denied. The fact that the opinion cited the statute shows that the court considered the provision.

D. The Threshold for En Banc Reconsideration has not been established.

"En banc reconsideration of a decision of a panel of the Supreme Court is not favored and ordinarily will not be ordered except when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the

Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue.” NRAP 40(a).

The threshold for a petition for en banc reconsideration is high. Justin Bros fails to meet this high burden in its reconsideration petition. This Court, in denying the petition for writ of mandamus filed in this case, applied the undisputed facts of this case to the clear requirements set forth in NRS 178.509, which have been recognized by this Court in its previous interpretations of this provision.

NRS 178.509 was the controlling statutory provision for resolving this case and Justin Bros should not have been surprised by this Court’s reliance on this provision. As noted above, Justin Bros primarily relied on NRS 178.509 in filing its three motions to exonerate in district court and in its mandamus petition filed in this Court, but Justin Bros changed its focus when its challenges were unsuccessful. Justin Bros argued NRS 178.509 applied until it was not beneficial for its case. This self-serving reasoning does not meet the high threshold required for a reconsideration petition.

Justin Bros does not sufficiently explain how this Court deviated from its existing precedent, established new precedent, or failed to follow the clear legislative directives set forth in NRS 178.509. This Court regularly declines to hear the arguments from litigants who fail to cogently argue, and present relevant authority in support of their appellate concerns. *Edwards v. Emperor's Garden*

Rest., 122 Nev. 317, 330, 130 P.3d 1280, 1288 (2006); *Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 117 P.3d 193, 198–99 (2005); *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987); *City of Las Vegas v. Bailey*, 92 Nev. 756, 558 P.2d 622 (1976); *Ellison v. State*, 87 Nev. 4, 4 n. 1, 479 P.2d 461, 461 n. 1 (1971); NRAP 28(a)(4). Therefore, the petition for en banc reconsideration should be summarily denied.

E. This Court and the District Court Properly Relied Upon NRS 178.509

The facts of this case and the law governing ancillary bail proceedings overwhelming support this Court's conclusion that NRS 178.509 governs this dispute and that Justin Bros failed to meet the requirement of that provision.

The Legislature's intent is clear once the conditions of released have been breached. "NRS 178.509 plainly prohibits courts from exonerating a bond for any reason other than those set forth in under subsection 1." *Justin Bros*, 132 Nev., Adv. Op. at 9. This Court upheld the factual findings of the district court that the Defendant breached a condition of his bail when he failed to appear for his scheduled court dates. Specifically, this Court correctly held that,

Respondent Second Judicial District Court Judge Janet Berry denied Justin Bros' motion, observing that: (1) Justin Bros did not attempt to exonerate bond number one while [the Defendant] was in custody from January 31 through February 3 or after Bonafide surrendered [the Defendant] to custody on May 14, but instead posted bond number three; (2) [the Defendant] failed to appear for his arraignments, had yet to be arraigned, and remained out of custody despite Justin Bros' acknowledgment that it had been in contact with

[the Defendant]; and (3) a bench warrant had been issued. The court concluded that, because [the Defendant] had not appeared before it since January 30, 2014, bond number one could not be exonerated.

Justin Bros, 132 Nev., Adv. Op. 47, at p. 4.

Justin Bros does not challenge these factual findings which are devastating to Justin Bros' petition for en banc reconsideration. A bail bond was posted on behalf of the Defendant, and the Defendant undeniably breached a condition of his bail by failing to appear in the district court as required.¹ The Defendant's bail bond had not been exonerated by the district court when the breach occurred, and pursuant to NRS 178.502(2)(b), a bail bond remains in effect until exonerated by a district court.

Pursuant to NRS 178.506, a district court "shall" declare a forfeiture of the bail if there is a breach of condition of the bond and after finding a breach, NRS 178.506 directs the district court to follow NRS 178.508 and 178.509. NRS

¹ Justin Bros incorrectly argues that the Defendant was remanded into custody "after making his scheduled court appearances." Pet. at 4. Justin Bros made this same wrong assertion in the petition for rehearing. Rehearing Pet. at 3. In truth, Dupree missed three court appearances while out on bail. Pet. Appx. 16-17, 89. Justin Bros conceded this. Pet. Appx. 16-17. Additionally, Justin Bros attempts to portray itself as a white knight who "delivered [Dupree] into custody" after his escape. En banc Pet. at 3, fn. 1. In reality, Dupree evaded law enforcement for more than five months, and during part of this time Justin Bros was "in contact with the defendant." (Conceded by Justin Bros at Pet. Appx. 18.) He was not taken into custody until nearly three months after Justin Bros informed the district court that Justin Bros was "in contact with" him. Pet. Appx. 18 (August 22, 2014, Justin Bros concedes being in contact with Dupree); En banc Pet. at 3, fn. 1 (Dupree back in custody in November of 2014).

178.508 sets the duties for how a district court shall proceed as a result of a breach and directs that the “bail bond is forfeited 180 days after the date on which the notice is mailed.” NRS 178.509 sets the requirements for exonerating a bail bond that has been breached which include proving the defendant cannot appear because of death, illness, insanity, detention by other authorities, or deportation. Justin Bros did not meet prove any of those grounds.

These unchallenged facts and law support the conclusion that this case was governed by an interpretation of NRS 178.509. See *Justin Bros*, 132 Nev. Adv. Op. 47, at p. 8-11. The district court faithfully followed the bail statutes after it determined there had been a breach of condition of bail and when it concluded the bail bond would be forfeited because the requirements set forth in NRS 178.509 had not been satisfied. This Court’s panel also set forth a clear understanding of the facts and the law governing this case when it denied the writ petition.

F. NRS 178.522 Does Not Apply To This Case

The petition for reconsideration repeatedly scolds this Court for not giving an adequate explanation regarding NRS 178.522. En Banc Pet. at 4. No law states that this Court “must explain” the statute. Justin Bros might not like the fact that this Court did not dwell on the statute as much as Justin Bros would have preferred, but this does not establish a ground for en banc reconsideration. Moreover, as discussed earlier, Justin Bros’ presentation of its argument regarding

NRS 178.522 was inadequate because it cannot establish the conditions of the bond were satisfied.

Justin Bros cannot and does not dispute there was a breach in a condition of bail. When there is a breach, NRS 178.506 states that, “the court shall declare a forfeiture . . .” *Johnson v. Eighth Judicial District Court*, 124 Nev. 249-250, 182 P.3d 94, 97 (2008)(“Shall” is mandatory and does not allow for judicial discretion). NRS 178.506 then directs the forfeiture process to NRS 178.508 and NRS 178.509. *We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170-71 (2008)(When the plain language of a statute establishes the Legislature’s intent, this Court “will give effect to such intention.”). NRS 178.506 does not direct the forfeiture process to NRS 178.522.

Consistent with its shotgun approach, Justin Bros does not explain how the two distinct sections of NRS 178.522 apply to its argument. NRS 178.522(1) states that, “When the condition of the bond has been satisfied or the forfeiture has been set aside or remitted, the court shall exonerate the obligors and release any bail.” In this case, the bail bond was not set aside or remitted, nor were the conditions of the bond satisfied (as noted above, Justin Bros concedes the conditions of the bail bond were not satisfied). NRS 178.522(1) clearly requires the conditions of bail to have been satisfied before a bond can be exonerated under this provision.

The conditions of bail in this case were not satisfied and the forfeiture was not set aside or remitted. As noted above, this Court and the district court expressly found the conditions of bail were violated when the Defendant failed to appear. Justin Bros does not challenge the accuracy of these findings nor does it make any argument the forfeiture was set aside or remitted. Therefore, these findings are not clearly erroneous and must be afforded deference. *Int'l Fid. Ins. Co. v. Blackjack Bonding*, 122 Nev. 39, 41, 126 P.3d 1133, 1134 (2006). Accordingly, NRS 178.522(1) does not apply.

Second, NRS 178.522(2) provides that, “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.” (Emphasis added.) Justin Bros overlooks that this statute uses the words “may be exonerated.” “‘May’ is to be construed as permissive, unless the clear intent of the legislature is to the contrary.” *Sengbusch v. Fuller*, 103 Nev. 580, 582, 747 P.2d 240 (1987). This statute provides a district court with discretion, something Justin Bros alleges that the district court did not have in this case. Therefore, the district court retained discretion as to whether to exonerate the bail bond while the Defendant was briefly remanded to custody.

Even NRS 178.522 does not provide for the automatic exoneration of a bail bond once a defendant violates the conditions of release. Justin Bros seems to forget that the defendant’s conduct related to his bail was an egregious violation of

the conditions of release. As noted above, this Court made a finding that the district court would have abused its discretion if it had exonerated the bail bond. This may be why Justin Bros does not explain how NRS 178.522 applies in this case.

NRS 178.522 would never apply in this case because the Defendant breached a condition of his bail while his bond was in effect – he failed to appear in court as required. The fact that the Defendant was later taken into custody, after missing multiple court appearance dates, does not constitute a “timely” surrender, as the statute requires. As this Court noted in the Advance Opinion at pages 9-10, “Exoneration is, in fact prohibited after a defendant fails to appear, save certain limited circumstances. *All Star Bail Bonds*, 130 Nev., Adv. Op. 45, 326 P.2d P.3d at 1110 (noting that NRS 178.509(1)’s use of the words ‘shall not’ demonstrates the Legislature’s intent to prohibit the district court’s discretion to exonerate a bond for any reasons other than the five conditions listed in the statute).”

Existing Nevada case law also does not support Justin Bros’ argument. Only two other published cases appear to cite NRS 178.522. *See Martinez v. Nevada*, 120 Nev. 200, 88 P.3d 825 (2004), and *Int’l Fid. Ins. Co. v. Blackjack Bonding*, 122 Nev. 39, 126 P.3d 1133 (2006). Neither case supports the arguments made in the petition for en banc reconsideration. Therefore, the district court and this Court correctly did not apply NRS 178.522 to this case.

Justin Bros, unfazed by this clear authority, seems to argue that the Nevada Legislature, through NRS 178.522, intended to prevent a district court, after it has declared a breach of the conditions of release, from carrying out the clear legislative directives set forth in NRS 178.508 and 178.509 if a criminal defendant returns to court at some date in the future. En banc Pet., at p. 11 fn. 5. This is baseless. While Justin Bros' goal is to have its bond exonerated, saying and arguing almost anything to achieve that goal is not appropriate.

The Nevada Legislature did not establish such a bail exoneration process. The statutes governing bail proceedings are clear and they place district court judges in charge of administering the legislative provisions and give explicit direction when there is a breach as there was in this case. The negative ramifications of following Justin Bros statutory interpretation would be considerable and would disrupt the orderly administration of criminal proceedings. District court judges would lose control of their courtrooms if a bail bondsman could decide if a criminal defendant had met the conditions of his release after a breach had been declared. This implausible scenario suggested by Justin Bros should be rejected by this Court.

G. Conclusion

Justin Bros misrepresents the facts, the applicable law, and the impact of this Court's decision. There is not a sufficient basis to grant en banc reconsideration of

this Court's decision. This Court, in denying the writ petition, did not misapprehend or overlook a material point of law or fact, or overlook, misapply or fail to consider a statute or decision directly controlling a dispositive issue in this case. This Court properly set forth the facts, legal posture of the case, and then decided the case upon the law governing the proceeding. This Court's decision is remarkably consistent with its previous decision related to ancillary bail proceedings.

As this Court noted, the district court would have abused its discretion by proceeding to exonerate Justin Bros' bond. This Court should reject this effort to litigate what is essentially a second petition for writ of mandamus and should be extremely wary of the consequences of adopting the legal theory advocated in the petition for reconsideration. The effect on our criminal justice system would be lasting.

Dated this 17th day of October, 2016.

CHRISTOPHER J. HICKS
District Attorney

LEMONS GRUNDY & EISENBERG

By /s/ Keith G. Munro
KEITH G. MUNRO
Deputy District Attorney
ATTORNEYS FOR REAL PARTIES
IN INTEREST

By /s/ Robert L. Eisenberg
ROBERT L. EISENBERG
ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer to petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14.

2. I further certify that this answer to petition for en banc reconsideration complies with the page or type-volume limitations of NRAP 40 or 40A because it does not exceed 4,667 words. It contains 3,721 words.

Dated this 17th day of October, 2016.

CHRISTOPHER J. HICKS
District Attorney

By /s/ Keith G. Munro
KEITH G. MUNRO
Deputy District Attorney
ATTORNEYS FOR REAL PARTIES
IN INTEREST

LEMONS GRUNDY & EISENBERG

By /s/ Robert L. Eisenberg
ROBERT L. EISENBERG
ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

Pursuant to NRAP 5(b), I certify that I am an employee of the Office of the District Attorney of Washoe County, over the age of 21 years, and not a party to nor interested in the within action. I certify that on this date, the foregoing was electronically filed with the Supreme Court of the State of Nevada by using the ECF System. Electronic service of the foregoing document shall be made in accordance with the Court's service list as follows:

Richard Cornell, Esq., for Petitioner

Adam Laxalt, Esq.

Terrence McCarthy, Deputy D.A.

Dated this 17th day October, 2016.

/s/ C. Mendoza

C. Mendoza