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To: Barbara Sattler, Deputy District Attorney

From: Applicant

Re: Draft Brief

Date: February 26, 2019

Per your request, please find below the draft brief demonstrating why forfeiture is appropriate and why exoneration is not justified in the matter of Henry and Oscar Raymond.

If you have any question, please do not hesitate to contact me.

Draft Brief In Support of Forfeiture of the Bond

State v. Henry Raymond, Defendant

Case No. CR-20180016

Oscar Raymond, the Bond Poster/Surety,

Real Party in Interest

(CHECK and insert correct pleading heading here)

Introduction

The court requested the reasons why the bond should be exonerated. This brief argues that the bond should be forfeit in this instance and why exoneration is not justified because Henry Raymond failed to appear which resulted in his acquittal and Oscar Raymond, the son of the defendant, knew that the bond would be forfeit for his father's

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failure to appear and therefore should not be exonerated.

### Statement of Facts

1. Henry Raymond (HR), was arrested February 13, 2018, on felony charges for unlawful possession of a narcotic drug, unlawful possession of a narcotic drug for sale and possession of drug paraphernalia.
2. Originally, defendant was held without bond but on the arraignment, February 23, 2018, a charge of an allegation of exceeding the threshold amount of cocaine was added.
3. On March 13, 2018, the trial court conducted a hearing on defense counsel's motion to set conditions of release. Pretrial Services report stated defendant had no prior convictions.
4. Defendant stated he lived in the neighboring State of Franklin, but provided no references. Bail was set at \$45,000 cash bond requirement.
5. On March 15, 2018, Oscar Raymond, HR's son, posted the \$45,000 and defendant was released.
6. Defendant fled soon after, and according to his son, he was not aware that his father would flee.
7. Oscar Raymond stated that he knew the bond forfeiture requirements and that if his father fled, it would be forfeited.
8. On January 30, 2019, trial began and Defendant was not present for the two days of the trial.
9. Jury was selected and impaneled, opening statements made and witnesses testified with several items of evidence submitted, the State rested.
10. Defendant's counsel motioned for judgment of acquittal which the court granted.
11. Defendant's counsel then moved for to exonerate the bond and was denied.
12. The order stated: "this matter be referred to the Superior Court Hearing Office for the commencement of bond forfeiture proceedings, based upon Defendant's failure to appear for his trial."

13. At the bond hearing the State stated that since the trial resulted in acquittal, due to HR fleeing, the acquittal was ordered because "no substantial evidence to warrant conviction, based upon insufficient evidence of the identity of the Defendant."

14. The Defendant's counsel made the argument that when a bond is exonerated on dismissal it should be exonerated on acquittal under the holding found in *People v. Weinberger*.

#### Argument

**The court should find a bond is not exonerated on dismissal because bonds are only exonerated when prosecution is dismissed not on acquittal by a motion granted to the defendant.**

The Rules of Criminal Procedure, Rule 13, state the rule for forfeiture of bail bonds when a defendant fails to appear. (*People v. Nationwide Surety Insurance Company*, Col. Sup. Ct., 2006). Rule 13(e) state that the decision whether or not to exonerate a bond shall be within the sound discretion of the court in all other instances unless the defendant has died or an affidavit is presented that the defendant is in custody in another jurisdiction. (Id.)

Therefore, in the case, the discretion of the court will apply to this matter because HR is not dead or incarcerated according to the facts at present.

For the exonerated of the bond to apply, the court found two factors must apply. 1. When the court finds that there is no further need for an appearance bond, it shall exonerate the appearance bond and order the return of the security deposit and 2. Release of Defendant: the prosecution is dismissed, defendant release from custody, unless he is in custody on some other charge and any appearance bond exonerated. (*People v. Weinberger*, Col. Ct. App., 2003). However, in *Weinberger*, the court held the primary purpose of an appearance bond is to ensure the defendant's presence. (Id.) Here, in HR's appearance, there is none. He fled before any proceedings to trial occurred, remained missing for a whole year and he is whereabouts are still unknown. Under Rule 13(d), in *Weinberger*, the court stated the bond shall be exonerated IF "at any time before violation there is no further need for an appearance.

Therefore, the need for appearance here is justified because without HR, the case ended in acquittal for failure to identify the suspect.

**Bond forfeiture should be granted because the surety bears the burden of**

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**coming forward with a request for relief and that request here is unreasonable due to the findings that mandate forfeiture.**

In Nationwide, the court stated bond agreements should be enforced when there is a breach of contract but a surety may have a defense if that the surety did not know Roger was a flight risk but the respondent cited that they should have known but it was not demonstrated by the respondent on how the surety should have known. The court concluded the surety would not have had any reasonable suspicion that Roger would flee when it posted the bail bond. (People v. Nationwide Surety Insurance Company, Col. Sup. Ct., 2006).

Here, the facts stated that Oscar did not know if his father would flee, but Oscar's sister asked the father if he was going to flee, and told the sister, his daughter he would not. The aunt is where HR intended to visit and then disappeared. The facts here show that Oscar, the sister and the aunt had little contact with HR, so the facts state Oscar really didn't know HR very well as over the course of the relationships being not close would not be able to ascertain the flight risk in the Nationwide case. This is entirely a statutory procedure and governed by the applicable statutes but the court held in Nationwide discretion of the court should consider the facts. (People v. Nationwide Surety Insurance Company, Col. Sup. Ct., 2006).

In People v. Sainly Bail Bonds, the court held that the surety should exercise care in ascertaining the defendant's circumstances, community ties similar to the courts determination of defendant's release conditions. (People v. Sainly Bail Bonds, Col. Ct. App., 2008). The court further states there is no authority that imposes a duty on the state to seek out a surety and furnish it information about the defendant, that someone else was to blame and concluded that the duty to ascertain flight risk is solely on the surety. (Id.)

The following five factors stated in Sainly, on whether to forfeit or remit in whole or in part may be considered by the court's discretion include: 1. defendant's willfulness in violating the order to appear, 2. whether the surety is a commercial entity, 3. the effort and expense expended by the surety in trying to locate defendant to insure defendant returns and the reasonable steps surety took to actively recapture defendant, 4. costs, inconvenience and prejudice suffered by State, and 5. public interest in ensuring defendant's appearance. (Id.)

Here, HR disappeared last year in March. Second, the willfulness led to the reason for the acquittal occurred here because Defendant's nonappearance is the reason for the acquittal due to the insufficient evidence of the identity of the Defendant based on his

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nonappearance. Defendant's counsel did not give any evidence of trying to find defendant. Oscar does state he knew the consequences and his expense would not be unreasonable if the forfeiture is granted. Also, the overwhelming evidence shows that Oscar did not make any attempt, expense to find his father, the costs and inconvenience of the State holding two days of trial and the public interest in ensuring justice were not met because defendant's case ended in acquittal. Further, the Defendant's counsel's argument is incorrect that the only reason for the acquittal was because it was impossible to identify the perpetrator since Defendant's absence by failing to appear is the reason for the acquittal. In addition, as we addressed further Defendant's argument should fail because in Weinberger, the court decision only applied to pretrial proceedings, as here the expense was a whole year of trial preparation and time spent trying to obtain justice for the public interest.

#### Conclusion

Therefore, in looking at the facts in this case, the bond should be forfeit because exoneration is not justified because Henry Raymond failed to appear which resulted in his acquittal and Oscar Raymond, the son of the defendant, knew that the bond would be forfeit for his father's failure to appear and therefore should not be exonerated in addition to the court costs to pursue a trial should prevail in the court determining that forfeit is justified.

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