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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN RE ARIZONA RULE OF CRIMINAL PROCEDURE, RULE 7.6	No. R-12-0036 REPLY TO THE COMMENT BY THE MARICOPA COUNTY SUPERIOR COURT TO THE PETITION TO AMEND ARIZONA RULE OF CRIMINAL PROCEDURE, RULE 7.6

The Comment by the Superior Court of Arizona, Maricopa County, raises four (4) issues. They are (in the order listed and discussed in its Comment) (1) a portion of the Petition is moot; (2) the Petition as proposed would deprive a judge of discretion "including discretion to forfeit a bond when a defendant fails to appear;" (3) the Petition is an improper attempt to use a rule amendment to rewrite a statute; and (4) the current timeframes for setting hearings are sufficient." Comment, page 1 lines 16-23. In this Reply the arguments listed in the Comment will be dealt with in the same order as posed in the Comment.

1. No portion of the Petition is moot

The Petition seeks to modify current Criminal Rule 7.6 in connection with the situation wherein after the

Defendant has failed to appear he is surrendered prior to the bond forfeiture hearing. The situation(s) recently dealt with via the modifications of A.R.S. Section 13-3974 do not deal with that issue. Rather, "new" A.R.S. Section 13-3974 clarifies existing Criminal Rule 7.6(d)(1) by codifying the exoneration of a bond wherein a defendant is surrendered prior to any violation. This is already the law in virtually all of the United States. (See attached, and incorporated herein as though fully set forth, a portion of an article authored by attorney/bail expert Milton Hirsch and which was published in the Winter 2002 edition of the magazine "The Bail's Agent's Perspective."

2. Judicial Discretion

In the Comment, Judge Welty complains that the Rule change, if enacted, would deprive him and judges similarly situated to exercise their discretion to deny exoneration when a defendant fails to appear at a hearing and is not in custody at the time of the hearing. (Comment page 3 lines 24-26.) That is absolutely true, and Judge Welty's position highlights what is wrong with allowing the current system to go unaltered.

As pointed out by undersigned counsel in his Reply to the Comment of the Maricopa County Attorney:

"The Petition seeks to give some certainty and to encourage a surety to apprehend and surrender an absconding defendant back into custody, so that the prosecution can move forward--as opposed to the present system which requires a surety to go "hat-in-hand" and "hope for the best" from the Court despite a rapid and successful apprehension by the surety. c.f. State v. Old West Bonding Company, 203 Ariz. 468, 475, 56 P.3d 42, 49 (Ct. of Appeals, Div. 1, 2002) which states:

> 'Here, even if Old West had arrested Sanders after receiving timely notification of the bench warrant, exoneration of the bond would still have been discretionary with the court.'

As pointed out in the Petition, there have been innumerable instances where the Court, at the behest of the State, has 'exercised its discretion' by forfeiting most or all of the amount of the bond, notwithstanding a successful and rapid apprehension and surrender."

Judge Welty, by his own admission, seeks to retain that discretion to forfeit the entire bond if the defendant misses a regularly scheduled court appearance--notwithstanding an apprehension and surrender of an absconding defendant prior to the bond forfeiture hearing. It is true, that is one of the situations the Petition hopes to change.

Finally on this issue, although Petitioner agrees with Judge Welty that one of the purposes of an appearance

bond is to have the defendant appear on time for all his regularly scheduled court appearances, c.f Comment, page 3 lines 16-24; sometimes times that doesn't happen. As indicated in State v. Vang, 763 N.W.2d 355, 358 (Minn.App. 2009), however,:

> "Another (purpose of a bail bond) is to encourage sureties to locate, arrest, and return defaulting defendants to the authorities to facilitate the timely administration of justice. [citing State v. Storkamp, 656 N.W.2d 539, 543 (S.Ct. Minn. 2003).]

As also indicated in the Reply to the Comment of the Maricopa County Attorney, the purpose of the Petition is to encourage the sureties to apprehend and surrender those defendants who do abscond, and take the uncertainty out of the system when such apprehension and surrender occurs. By doing so the proposed Rule change encourages the timely administration of justice and does not leave the amount of forfeiture to judges who may want or be persuaded to forfeit most or all of the bond notwithstanding the timely apprehension and surrender.

3. The Petition does not attempt to use this Rule Amendment to Revise a Statute

The Comment next advances the argument that "[T]he Petition is an improper attempt to use a rule amendment to substantially revise a statute." (Comment, page 4

lines 7-9). As support for this proposition the Comment cites Sullivan v. Pulte Homes Corp., 213 Ariz. 53, 290 P.3d 446 (App. Div. 1, 2012) which, as the Comment correctly indicates, cites the case of Albano v. Shea Homes Ltd. P'ship, 227 Ariz. 121, 254 P.3d 360 (Ariz. 2011) with the following quote "it would be improper to to employ a court-adopted rule of procedure to alter the substantive right of a statute ..." (More about what was left out of the quote, infra.) The Comment cites one additional case, State v. Birmingham, 95 Ariz. 310, 390 P.2d 103 (S.Ct. 1964), as support for its argument.

Let us first turn to a discussion of Sullivan, supra, and Albano, supra. In doing so Petitioner wishes to point out that the Commentor left out of the hereinbefore mentioned quote some very important language. The entire quote from Sullivan reads:

> "A statute of repose 'defines a substantive right.' Albano v. Shea Homes Ltd. P'ship, 227 Ariz. 121, 127 paragraph 24, 254 P.3d 360, 366 (2011) [citing Hosogai v. Kadota, 145 Ariz. 227, 231, 700 P.2d 1327, 1331 (1985)]. In Albano our supreme court decided that the period of repose in A.R.S. Section 12-552 would not be tolled for a class action because it would be improper to 'employ a court-adopted rule of procedure to alter the substantive effect

of a statute of repose.'"
(emphasis added)

Sullivan, 213 Ariz. at 59, 290 P.3d at 451. Indeed, omitting the words "of repose" from the quote in Sullivan, supra, cited in the Comment alters the entire meaning of the argument. Both in Sullivan, supra, and Albano, supra, the Appellants sought to have their claims circumvented by the applicable statute of repose/statute of limitations. Both in Sullivan, supra, and Albano, supra, the appellate court would have nothing to do with that argument.

Our Petition does not seek to modify any statute, much less a statute of repose as discussed in both Sullivan, supra and Albano, supra. It seeks to modify (and in Petitioner's opinion, improve) the existing language of Criminal Rule 7.6. The Petition has nothing to with altering the substantive effect of a statute of repose.

Finally, the Comment cites State v. Birmingham, supra. In Birmingham, supra, the appellees claimed the appellate court was without jurisdiction to rule on the appeal by the appellant State. That was so since the appeal, as claimed by the appellees, was predicated on an unsigned minute order ruling, in violation of Arizona Rule of Civil Procedure, Rule 58(a)--which required all judgments to be signed.

In rejecting that argument the appellate court indicated that what was appealed from was not an unsigned judgment, but a either an order dissolving an injunction [c.f. A.R.S. 12-2101(A)(5)(b)] or from a special order made after a final judgment [c.f. A.R.S. 12-2101(A)(2).] Under those circumstances, opined the court, the "statute must control," and any supposed violation of the civil rule only affects procedural matters, and could not diminish the substantive right of a statutory appeal. This, too, is not our case.

4. The current timeframes for setting hearings are insufficient

Finally, Judge Welty complains that the proposed changes to the existing setting of a bond forfeiture hearing, (currently "within a reasonable time, not exceeding 120 days") is satisfactory and should not be amended. The judge claims the proposed minimum 60 day period for the initial setting of a bond forfeiture hearing "could increase delay and restrict the court's ability to manage its docket." (Comment, page 5 lines 1-2.) Really? How? By being unable to set a hearing earlier than 60 days after the issuance of a bench warrant? How could that possibly "increase delay" or "restrict the court's ability to manage its docket." The simple answer is, it wouldn't. Besides, even assuming

arguendo, that the proposed language did occasionally create some delay or docket problem, it would be far outweighed by the benefits created to the surety on a diligent manhunt. State v. Vang, supra.

Finally, the Judge complains that the proposed language of "not more than 120 days" (within which to set a hearing) "could be read to as an attempt to preclude the court from holding a hearing beyond 120 days." (Comment, page 5 lines 3-5). The Petition merely endeavors to maintain the outer limit for setting the bond forfeiture hearing as currently exists in Rule 7.6. How can Judge Welty complain about that? Besides, wouldn't the setting of a hearing beyond the 120 limit, as the judge seems now to be concerned about, fly in the face of his concern, expressed immediately before in the Comment, that setting a hearing in not less than 60 days "could create increased delay."

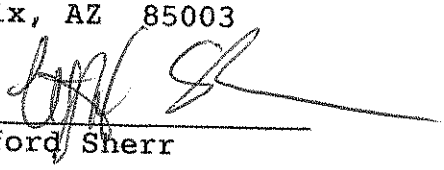
For all of the foregoing reasons it is respectfully requested that the Comments of the Superior Court of Maricopa County be rejected, and the Petition as submitted, adopted.

Respectfully submitted this 31st day of May, 2013.

Clifford Sherr
Attorney Petitioner

Copy of the foregoing
mailed this 31st day of May
2013, to:

Honorable Joseph Welty
Criminal Department Presiding Judge
Maricopa County Superior Court
175 West Madison Street
Phoenix, AZ 85003



Clifford Sherr

Legal Corner

MILTON HIRSCH

The bail agent's privilege is not merely the power to arrest; it is the power to surrender, i.e. to return the principal to the custody of the obligee and thus terminate the obligation running from the surety to the obligee. It would be fair to say that this is the essence of the privilege itself.

The law could scarcely be otherwise. Given that the bail agent may arrest his principal—a proposition nowhere in dispute—it must follow that the bail agent can and should immediately return the principal to the custody of the obligee, i.e. the state or county. The alternative—the bail agent holding his principal in the agent's private custody (locked in the trunk of a car perhaps, or hog-tied in a closet at the office)—is something that no bail agent wants to contemplate, and that no court wants to encourage.

A canvass of American jurisprudence reveals the following settled principles of law: that as between the surety and the obligee, the surety has a unilateral power to surrender his principal; that the obligee cannot act to hinder the exercise of that unilateral power by the surety; and that the principal's remedy, if any, for a bad-faith exercise of the surrender power by the surety is a claim for remission of the bail bond premium or money damages.

> A. As between the surety and the obligee, the surety has a unilateral power to surrender his principal.

At common law a surety exercised an all-but-absolute power to surrender his principal. *State v. Mahon,* 3 Del. 568, 569, 1841 Del. LEXIS 42, 3 (Ct.Gen.Sess. Del. 1841) (surety "has the right to arrest his principal anywhere, and at any time to [sur]render him in discharge of the bail. ... [Surety] has always the right to surrender" his principal); *Jordan v. Knight*, 35 So. 178 (Ala. 1948) ("at common law, it was the right of the bail at any time to arrest and surrender the principal into the custody of the law in discharge of their obligation to the State under the bond"); *see also Shifflett v. State,* 572 A.2d 167 (Md. 1990). This plenary common-law power is at present codified in the statutes and procedural rules of many American states. *See e.g.*, Ark. Stat. §43-716; Conn. Gen. Stat. §54-65; Del. Super. Ct. Crim. R.46(f); Del. Com. P. Ct. Crim. R.46(f); Fla.Stat. §903.20 ("[A] surety may surrender the defendant at any time before breach of the bond"); La. C.Cr.P. Art. 338A ("A surety may surrender the defendant ... at any time prior to forfeiture or within the time allowed by law for setting aside a judgment of forfeiture"); Mass. Ann. Laws ch. 276, §68 ("Bail in criminal cases may be exonerated at any time before default upon their recognizance by surrendering their principal into court or to the jailer in the county where the principal is ... to appear"); Md. Rule 4-217(h); Vernon's Ann. C.C.P. Tex. Art. 17.16 ("Those who have become bail for the accused, or either of them, may at any time relieve themselves of their undertaking by surrendering the accused into the custody of the sheriff of the county where he is prosecuted").