



California Bar Examination

**Performance Test
and
Selected Answers**

February 2019



The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

PERFORMANCE TEST AND SELECTED ANSWERS

FEBRUARY 2019

CALIFORNIA BAR EXAMINATION

This publication contains the performance test from the February 2019 California Bar Examination and two selected answers.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

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February 2019

**California
Bar
Examination**

**Performance Test
INSTRUCTIONS AND FILE**

PEOPLE v. RAYMOND

Instructions.....

FILE

Memorandum to Applicant from Barbara Sattler

Transcript of Bond Forfeiture Hearing

PEOPLE v. RAYMOND

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. This performance test is designed to be completed in 90 minutes. Although there are no parameters on how to apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response. Since the time allotted for this session of the examination includes two (2) essay questions in addition to this performance test, time management is essential.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

CRUZ COUNTY DISTRICT ATTORNEY'S OFFICE

65 N. Hammer Ave, 6th Floor

Dead Horse, Columbia

MEMORANDUM

TO: Applicant
FROM: Barbara Sattler, Deputy District Attorney
RE: State v. Henry Raymond, Defendant, and Oscar Raymond,
the Bond Poster/Surety, Real Party in Interest
DATE: February 26, 2019

Our office recently sought forfeiture of a \$45,000 cash bond posted to release Henry Raymond, a criminal defendant, because he did not appear for the trial. At the forfeiture hearing, Oscar Raymond, the surety, raised arguments why the bond should be exonerated -- in other words, returned to the surety -- despite the non-appearance. Oscar Raymond is the son of the defendant Henry Raymond.

The trial court offered each side the opportunity to brief the court concerning the issues. Please draft a Brief In Support of Forfeiture of the Bond demonstrating why forfeiture is appropriate and why exoneration is not justified.

TRANSCRIPT OF BOND FORFEITURE HEARING

Honorable Beth Jones, Presiding

THE COURT: The next case is The State of Columbia, Plaintiff, versus Henry Raymond, Defendant, Bond in the Amount of \$45,000, and Oscar Raymond, the Bond Poster and Surety, Case number CR - 20180016. This is a Bond Forfeiture Proceeding concerning an appearance bond. Ms. Sattler, I see you are here for the People. Ms. Urias, are you here on behalf of Oscar Raymond, the surety?

MS. URIAS: Yes, your honor.

THE COURT: Ms. Sattler, do you want to explain the facts and the grounds for forfeiture?

PEOPLE: Yes. Thank you, your honor. The Defendant, Henry Raymond, was arrested and booked on February 13, 2018, on felony charges of unlawful possession of a narcotic drug, unlawful possession of a narcotic drug for sale, and possession of drug paraphernalia. An interim complaint on those charges was sworn out on that same date. It included the information that the offenses involved about 44 grams of cocaine and admissions by Defendant that he was selling cocaine. At the initial appearance, the Magistrate held Defendant without bond. The grand jury returned an indictment against Defendant on February 23, 2018, on felony counts of possession of a narcotic drug for sale and possession of drug paraphernalia, including an allegation of exceeding the threshold amount of cocaine. On February 27, 2018, Defendant appeared for his arraignment. On March 13, 2018, the trial court conducted a hearing on defense counsel's motion to set conditions of release. The Pretrial Services report indicated that Defendant had no prior convictions. He stated that his permanent residence was in the neighboring State of Franklin, but he provided no references or sources for verification of this information. The trial court set a \$45,000 cash bond requirement. On March 15, 2018, Mr. Oscar Raymond posted the \$45,000 cash bond and Defendant was released from Cruz County Superior Court hold.

THE COURT: Sorry to interrupt, Ms. Sattler. My understanding is that the surety, Mr. Oscar Raymond, is the son of Defendant Henry Raymond?

PEOPLE: Yes, your honor.

THE COURT: Okay. Please continue.

PEOPLE: Thank you, your honor. On March 23, 2018, at a pretrial conference, Defendant's counsel told the trial court that Defendant's bond had been posted and that Defendant had fled. The trial court noted in the Minute entry that "defense counsel bears the responsibility for arranging Defendant's return." A trial date was set for October 22, 2018. At a pretrial conference, the trial date was postponed by the trial judge until January 30, 2019. On January 30, 2019 trial began, and Defendant failed to appear. A jury was selected and impaneled, opening statements were made, two witnesses testified, and several items of evidence were admitted. On the second day of trial, January 31, Defendant again failed to appear. Several more witnesses testified and additional items of evidence were admitted. The State then rested, and defense counsel made a motion for judgment of acquittal. The trial court granted the motion, acquitting Defendant and ending the trial. Defense counsel moved to exonerate the bond. The trial court denied the motion, however, and ordered, I quote: "that 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." The State seeks forfeiture of the bond for failure to comply with the bond conditions, your honor.

THE COURT: Okay, unless you have anything more, Ms. Sattler

PEOPLE: No, that's it, your honor.

THE COURT: . . . then go ahead, Ms. Urias, and explain why, in face of the nonappearance and proper notice, the bond should be exonerated.

MS. URIAS: Thank you, your honor. Assuming for the moment that the People have made out a prima facie case for forfeiture, there are two reasons why the bond must be exonerated. First, the bond may be exonerated due to mandatory statutory grounds. Defendant was acquitted, and Columbia Rules of Criminal Procedure provide for mandatory exoneration in such a situation. It isn't discretionary. Second, the facts of this case justify the exercise of your discretion to exonerate the bond for several reasons, your honor . . .

THE COURT: . . . I got it. Why does the acquittal exonerate the bond?

MS. URIAS: At the close of the People's case in the *in absentia* trial proceeding, the defense moved for and received a judgment of acquittal. According to Columbia Rule of Criminal Procedure 13(d)(1), when there is no further need for an appearance bond, exoneration is mandatory. The rule does not allow discretion with regard to exoneration if there is no further need for an appearance bond, as the statute says "shall." Similarly, Columbia Rule of Criminal Procedure 13(d)(2) requires that when a prosecution is dismissed, the defendant shall be released on those charges and the bond exonerated. That rule must be construed to signify any dismissal of a case on its merits. It would be sheer absurdity to conclude that an appearance bond is exonerated on dismissal but not on acquittal. We believe the holding of *People v. Weinberger*, applied here, requires exoneration.

THE COURT: Ms. Sattler, do you have a response?

PEOPLE: Your honor, the statute Ms. Urias cites pertains to pretrial events and doesn't require mandatory exoneration in this case. The primary reason for an appearance bond is to have the defendant appear for trial, and Defendant didn't show up. The trial court found that Defendant's acquittal was because Defendant's absence made identification impossible. The finding was, I quote: "There is no substantial evidence to warrant a conviction, based upon insufficient evidence of the identity of the Defendant."

THE COURT: Ms. Urias, you said there were other reasons for exoneration.

MS. URIAS: Yes, your honor, Oscar made good faith efforts to ensure his father's appearance at trial. We would like to have him briefly testify, your honor.

THE COURT: Okay Mr. Raymond, come have a seat in the witness chair. The courtroom clerk will swear in the Witness.

THE COURT: Go ahead, Ms. Urias, you may question your witness.

BY MS. URIAS:

Q: Could you state your name and address for the record?

A: Oscar Raymond, 3898 West 14th Street, Twin Oaks, Columbia.

Q: When you arranged bail for your father, did you get a chance to speak to him?

A: Yes.

Q: Did you ask him whether he intended to appear at trial?

A: No.

Q: Why not?

A: I don't know. I guess I figured that he would appear.

Q: After you posted bail, what happened?

A: My dad came home and, according to my sister, he stayed around for a few weeks. One day, he said he was going to visit my aunt, his sister, who lives across town. My sister asked him if he was going to skip bail. He said, no, that he planned to fight the charges. Then he disappeared. I called my aunt, and she said he left her house after an hour. I didn't know what else I could do.

Q: Have you ever posted bail for anyone before?

A: Never.

MS. URIAS: That is all that I have, your honor.

THE COURT: Ms. Sattler, do you have questions for the witness?

MS. SATTLER: A few, your honor.

BY THE PEOPLE:

Q: You didn't live with your father did you, Mr. Raymond?

A: No, I didn't.

Q: In fact, he hasn't been much of a presence in your life, has he?

A: No, not really.

Q: How often did you see your father?

A: Not often. He hasn't been around much. He doesn't really have many ties here except for my sister, my aunt and me. And none of us really see him very much.

Q: You've been financially independent from him for a number of years, haven't you?

A: Yes, I moved out right after graduating from high school and have supported myself since then.

Q: You make a pretty good living, don't you?

A: I guess so. I work as a software engineer and I make about \$120,000 per year.

Q: Was posting the \$45,000 bond a financial hardship for you?

A: It would hurt to lose it, but I have quite a bit saved up to help my sister with her college education.

Q: When you posted the bond, were you aware that your father may have been involved in unlawful activities?

A: Yes, I was aware.

Q: You were aware, then, that there was a decent chance he would flee rather than face trial?

A: I didn't really think much about it, but I suppose that's true too. I didn't see that I had much choice, though. It was my dad.

Q: Oscar, did you make any effort to find out where your dad was and to contact his defense counsel or the prosecutor so that he would appear for trial?

A: No.

Q: Before you signed the appearance bond agreement, you read it very carefully, didn't you?

A: Yeah, I guess so.

Q: And you understood that by signing the agreement both you and your father were responsible for your father's appearances in court, didn't you?

A: Yeah.

Q: And you also understood that if you or your father failed in that responsibility you would lose all of the money you put up, right?

A: Yeah. I knew how it worked, and I knew that if he didn't show up for any of the stuff he was supposed to show up for that I would end up losing the money, but I didn't have any way to find him and make him show up.

THE PEOPLE: Your honor, I have no further questions.

THE COURT: Redirect, Ms. Urias?

MS. URIAS: Nothing, your honor.

THE COURT: Under the circumstances, I'm going to take this under advisement. I would like both sides to do some research and submit a brief on each of the reasons raised by Oscar Raymond as to why the bond should be exonerated.

THE PEOPLE: Thank you, your honor. We would appreciate it.

MS. URIAS: Thank you, your honor.



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PEOPLE v. RAYMOND

LIBRARY

People v. Nationwide Surety Insurance Company

Columbia Supreme Court (2006)

People v. Saintly Bail Bonds

Columbia Court of Appeals (2008)

People v. Weinberger

Columbia Court of Appeals (2003)

PEOPLE v. NATIONWIDE SURETY INSURANCE COMPANY

Columbia Supreme Court (2006)

Nationwide Surety Insurance Company (Nationwide Surety) appeals from the trial court's order denying its motion to vacate forfeiture and exonerate the bail bond it posted for Robert Roger. The bond was forfeited when Roger did not appear at his preliminary hearing.

FACTS

Roger was arrested for a drug-related offense. Nationwide Surety posted a \$20,000 bail bond for him the same day, after Roger presented a Columbia driver's license, social security card, and other documents. Roger was ordered to return for his preliminary hearing. However, immediately following execution of the bond, Roger fled. He did not appear for the preliminary hearing, and Nationwide Surety's bond was then ordered forfeited.

BACKGROUND RELATING TO BAIL BOND STATUTES

While bail bond proceedings occur in connection with criminal prosecutions, they are independent from and collateral to the prosecutions and are civil in nature. 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. Nevertheless, the bail bond is a contract between the poster of the bond (the surety) and the government whereby the surety acts as a guarantor of the defendant's appearance in court under the risk of forfeiture of the bond. When there is a breach of this contract, the bond agreement should be enforced. The scope of the surety's risk is defined by the terms of the bond agreement and applicable statutes. The forfeiture or exoneration of the bail bond is entirely a statutory procedure, and forfeiture proceedings are governed entirely by the special statutes applicable thereto. Thus forfeiture proceedings, even though instituted in criminal matters, are simply a streamlined substitute for a civil suit resulting from a breach of contract.

Consistent with long-standing notions such as "equity abhors a forfeiture," the rules calling for bond forfeiture must be strictly construed in favor of the surety to avoid the harsh results of a forfeiture. However, nonappearance for trial creates a presumption of forfeiture. Once there has been a demonstration that by failing to appear the defendant has not complied with the terms of the bond agreement, the surety bears the burden of coming forward with a request for relief from forfeiture and making the necessary showing, by competent evidence, of a legally recognized justification for the failure to appear, either because the statute mandates exoneration or because it should be exonerated in whole or in part in the sound discretion of the court.

Rules of Criminal Procedure, Rule 13, specifically concerns the procedure applicable to forfeiture of bail bonds, which occurs when the defendant whose appearance in court is assured by the bond fails to appear.

If the surety surrenders the accused to the sheriff of the county in which the prosecution is pending, or delivers an affidavit to the sheriff stating that the defendant is incarcerated in this or another jurisdiction, and the sheriff reports the surrender or status to the court, the court shall vacate any order of forfeiture and exonerate the bond. Rules of Criminal Procedure, Rule 13(d), provides that the court shall exonerate an appearance bond in the event of pretrial dismissal or when other pretrial circumstances ranging from death of the defendant to diversion preclude further need for an appearance bond. Rules of Criminal Procedure, Rule 13(e), provides that in all other instances, "the decision whether or not to exonerate a bond shall be within the sound discretion of the court."

Respondent contends the bail should remain forfeited because Nationwide Surety should have known Roger was a flight risk. It is true that generally parties in contract disputes are held to bear the risk concerning events of which they knew or should have known. Just how Nationwide Surety should have known that Roger was a flight risk, however, is not demonstrated by the respondent. Roger presented a Columbia driver's license, a social security card, and other documents that showed his ties to the community. While these may have been fraudulent documents, there has been no showing that Nationwide Surety had

any reasonable suspicion that Roger would flee when it posted the bail bond. We are convinced that Nationwide Surety cannot be faulted. Nationwide Surety acted in the good faith belief that Roger would appear.

For all of the above stated reasons, the order denying appellant's motion to vacate forfeiture is reversed.

PEOPLE v. SAINTLY BAIL BONDS

Columbia Court of Appeals (2008)

Saintly Bail Bonds (the surety) posted a \$55,000 appearance bond for criminal defendant Jerry Marshall after he was indicted on a drug charge in April 2003. When the defendant failed to appear at a pretrial conference in July, his attorney told the judge the defendant was in the custody of the Department of Corrections of the State of Franklin. The judge nonetheless set a trial date and ordered the state to prepare a writ of habeas corpus and arrange for the defendant to be transported to Pima County for a pre-trial conference. When the state was unable to secure the defendant's appearance through the writ, the judge ordered the \$55,000 bond forfeited. The surety appealed. We affirm.

The surety argues the defendant did not fail to appear on his own volition and that the surety cannot be held responsible for failing to produce the defendant. In short, according to the surety, "it is anyone's fault but the Bond Poster's that the defendant has technically, if at all, violated the release conditions." We disagree.

It is well settled in this jurisdiction that a surety assumes the risk of a defendant's failure to appear. To alleviate that risk, a surety should exercise care in ascertaining the defendant's circumstances and community ties before executing an appearance bond, much as a trial court must do before determining a defendant's release conditions. Although the surety claims it was not aware and had no reason to be aware that the Franklin Department of Corrections might be interested in defendant at the time it posted the bond, the record demonstrates that the surety could have easily acquired that information by simply contacting jail personnel. And, because we know of no authority that imposes a duty on the state to seek out a surety and furnish it information about a criminal defendant, we do not accept the surety's argument that someone else was to blame. To the contrary, no one but the surety had any duty to ascertain the wisdom or folly of contracting with the defendant to post a bond that would secure his appearance in court.

The *Nationwide Surety* case does not require a different conclusion. In that case, there was no reason for the surety to know that the defendant was a flight risk.

Nor do we accept the surety's argument that the trial court abused its discretion by rejecting the surety's explanation for the defendant's failure to appear. Once there has been a determination that a defendant failed to appear or otherwise comply with the terms of the appearance bond, except where a statute specifically requires exoneration, the decision to order an appearance bond forfeited or to remit in whole or in part lies essentially in the discretion of the trial court. A trial court may consider all of the relevant circumstances, including the following list of factors that Columbia courts have frequently delineated:

- The defendant's willfulness in violating the order to appear;
- Whether the surety is a commercial entity (noncommercial sureties are often given more latitude concerning return of some or all of the bond);
- The effort and expense expended by the surety in trying to locate and apprehend the defendant to insure the return of the fugitive (lack of effort by the surety to locate the defendant's return justifies forfeiture, as it is necessary to provide an incentive to the surety to take active and reasonable steps to recapture a fugitive defendant);
- The costs, inconvenience and prejudice suffered by the State, if any, because of the absence of defendant;
- The public's interest in ensuring a defendant's appearance.

Here, there is no indication that the defendant made any effort to attend the scheduled court conference. Defense counsel never asserted that the defendant had expressed any desire to abide by his promise to appear. Indeed, nothing in the record suggests that the defendant had made any effort even to contact his defense counsel. Nor has the surety demonstrated that it expended any effort or expense in attempting to arrange for his appearance.

The trial court's decision to forfeit the bond was not an abuse of discretion. Because the defendant failed to make any effort to appear at trial, he must be considered to have willfully violated the terms of the appearance bond. In addition, because the surety, a commercial entity, expended no effort or expense to produce the defendant, there is no need to protect the incentives of sureties generally to post bonds, and forfeiture serves the purpose of providing proper incentives to sureties to live up to their obligations to ensure that the defendant adheres to the terms and conditions of the bond.

Affirmed.

PEOPLE v. WEINBERGER
Columbia Court of Appeals (2003)

FACTS AND PROCEDURAL BACKGROUND

Appellant Weinberger was arrested and charged with possession of marijuana for sale. He appeared before a magistrate for his initial appearance and bond was set at \$30,000. Appellant and others were subsequently indicted for possession of marijuana for sale. Appellant posted the \$30,000 cash bond through his agent and was ordered released from custody on that date. Subsequently, after appellant had failed to appear at a pretrial conference, a bench warrant was issued for appellant's arrest, but no motion was made to forfeit the bond. On the same date the warrant was issued, several motions were argued to the court, including motions to suppress evidence. The court took the matter under advisement for two days and then granted the motion to suppress. The state moved to dismiss the case against appellant, which was granted with prejudice. Shortly after, appellant moved to exonerate his bond. At the bond forfeiture hearing, the hearing officer ruled it irrelevant that the indictment against appellant had been dismissed and ordered the subject bond forfeited.

BOND FORFEITURE

Appellant contends that because the indictment against him was dismissed with prejudice prior to trial and prior to the bonds being forfeited, he is entitled by law to have his bond exonerated. It is well established that the termination of a prosecution before forfeiture of an appearance bond terminates a surety's liability on the bond. Additionally, appellants rely on Rule 13(d) of the Columbia Rules of Criminal Procedure to support this conclusion. According to its terms, Rule 13 "shall govern the procedure to be followed in cases between arraignment and trial."

Columbia Rules of Criminal Procedure, Rule 13(d) - Exoneration of Bond, Dismissal of Prosecution, provides:

(1) Exoneration of Appearance Bond: At any time before violation that the court finds that there is no further need for an appearance bond, it shall exonerate the appearance bond and order the return of any security deposit.

(2) Release of Defendant - Exoneration of Bond: When a prosecution is dismissed, the defendant shall be released from custody, unless he is in custody on some other charge, and any appearance bond exonerated.

The primary purpose of an appearance bond is to ensure the defendant's presence at the time of trial. When, as here, the charges are dismissed prior to trial, the primary purpose for the bond no longer exists, and from that point forward there is no further need for the appearance bond. This is why Rule 13(d) indicates that if the charges are dismissed or that there otherwise is no longer a reason for the appearance bond the appearance bond shall be exonerated.

Rule 13(d), by stating that the bond shall be exonerated if "at any time *before violation* there is no further need for an appearance bond" (emphasis added), envisions that there is no requirement to exonerate the bond if a violation of the bond terms took place prior to the dismissal. But the fact remains that in this case the main purpose of the appearance bond, to ensure the defendant's presence at trial, ceased at the dismissal. The State was not prejudiced by the non-appearance of appellant at one pretrial conference, which is the only possible violation of the bond terms. If there was a violation, it was for only a matter of hours. The appellant's presence was not required for any other event prior to dismissal, and the issue of forfeiture was not raised by the State, perhaps because the State anticipated filing a motion to dismiss the charges. Given these facts, Rule 13(d), which requires exoneration of the bond when a prosecution is dismissed, dictates the result.

The order of the court commissioner is vacated and the trial court is directed to enter an order exonerating appellant's bond.

PT: SELECTED ANSWER 1

-----X

THE STATE OF COLUMBIA, :
Plaintiff, :

Case number CR-0180016

v. :
HENRY RAYMOND, Defendant and :
OSCAR RAYMOND, Bond Poster and Surety :

-----X

The State of Columbia's Brief In Support of Forfeiture of the Bond

The State of Columbia ("Plaintiff") respectfully submits this Brief in support of forfeiture of that certain appearance bond in the amount of \$45,000 (the "Bond") which had been posted by Oscar Raymond (the "Surety") on behalf of his father Henry Raymond ("Defendant").

PRELIMINARY STATEMENT

The entire purpose of the Bond was to ensure that Defendant appeared at his criminal trial. Surety - Defendant's own son - knowingly and voluntarily chose and agreed to act as Surety and, as such, he was responsible for ensuring his father's appearance at trial. Defendant never showed up for multiple pre-trial proceedings, and then never showed up at his trial. Defendant unjustly benefited from his violations of court orders because he was acquitted at trial only because his failure to appear allowed him to shield his identity from evidence at trial.

This is exactly the type of case for which the Surety's Bond should be forfeited. Surety breached his obligations under the Bond and indeed acted in complete disregard of his responsibilities, having taken no action whatsoever to secure his father's appearance at trial. Under these circumstances, the law requires forfeiture of the Bond. See Argument Point I below.

On oral argument for this matter, Surety argued that exoneration of the Bond is required by Columbia Rule of Criminal Procedure 13(d)(1) and/or (2). We show below that those arguments are meritless, as nothing within either of those rules mandates or permits exoneration of the Bond. See Argument Points II.A and II.B below.

The law does permit exoneration of the Bond in the Court's discretion, but we show below that any such discretion should not be exercised based upon the facts of this case, as applied to the relevant factors which the Columbia Supreme Court has ruled should be applied in connection with the discretionary determination. See Point II.C below.

FACTS

A. Defendant's Arrest, Indictment, Trial and Acquittal

In February 2018, Defendant was arrested, booked and indicted on felony counts of possession of a narcotic drug for sale and possession of drug paraphernalia, including an allegation of exceeding the threshold amount of cocaine. On February 27, 2018, Defendant appeared for his arraignment --- but this was the last appearance Defendant ever would make in the case.

On March 13, 2018, the trial court conducted a hearing on defense counsel's motion to set conditions of release. Defendant stated that his permanent residence was in the neighboring State of Franklin, but he provided no references or sources for verification of this information. The trial court set a \$45,000 cash bond requirement.

On March 15, 2018, the aforementioned bond was posted by Surety, who is Defendant's son. As a result, Defendant was released from Cruz County Superior Court hold.

On March 23, 2018, at a pretrial conference, Defendant's counsel told the trial court that Defendant's bond had been posted and that Defendant had fled. The trial court noted in the Minute entry that "defense counsel bears the responsibility for arranging Defendant's return." A trial date was set for October 22, 2018, and later postponed by the trial judge until January 30, 2019.

On January 30, 2019, trial began, and Defendant failed to appear. A jury was selected and impaneled, opening statements were made, two witnesses testified and several items of evidence were admitted. The State then rested, and defense counsel made a motion for judgment of acquittal. The trial court granted the motion, acquitting Defendant and ending the trial. Importantly, the trial court found that Defendant's acquittal was because Defendant's absence made identification impossible. The court specifically found that "There is no substantial evidence to warrant a conviction, based upon insufficient evidence of the identity of the Defendant."

B. The Surety's Lack of Knowledge, Effort and/or Diligence.

At a hearing before this Court, the Surety testified in a way making clear that he exercised little if any effort and/or diligence in causing his father to appear at trial. Indeed, among his testimony, Surety admitted the following in open Court (see transcript):

(1) Surety never asked his father if he intended to appear at trial

(2) Surety made little to no effort to locate his father: all he did was call his aunt who said that Defendant had left her house; Surety took no further action to locate Defendant;

(3) Surety and Defendant had little to no relationship such that Surety never had good cause to believe that he would have any contact with Defendant sufficient to cause his appearance;

(4) Surety was aware of the fact that Defendant had few if any ties to the community, and he was rarely seen;

(5) Forfeiture of the security bond would not cause hardship upon Surety because Surety has "quite a bit saved up";

(6) Surety was aware that his father may have been involved in unlawful activities;

(7) Surety made no effort to find out where Defendant was so that he would appear at trial;

(8) Surety read and understood the appearance bond agreement he entered, and understood the consequence of Defendant's failure to appear.

PROCEDURAL HISTORY

Following Defendant's acquittal, Defendant's counsel moved to exonerate the bond. The trial court denied the motion and ordered that "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." Oral argument was conducted, and each party was offered the opportunity to brief the court concerning the issues.

ARGUMENT

For the reasons set forth below, forfeiture of the Bond is appropriate and exoneration is not justified.

POINT I

THE BOND SHOULD BE FORFEITED BECAUSE DEFENDANT FAILED TO APPEAR AT TRIAL

As the Columbia Supreme Court made clear in *People v. Nationwide Surety Insurance Company* (2006), "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." Further, "[i]t is well settled in this jurisdiction that a surety assumes the risk of a defendant's failure to appear." *People v. Sainly Bail Bonds*, Columbia Court of Appeals (2008). Moreover, "nonappearance for trial creates a presumption of forfeiture." *People v. Nationwide Surety Ins. Co.* (Columbia Supreme Court 2006).

Here, it is undisputed that Defendant failed to appear at trial as required by the Bond. Moreover, Defendant unjustly benefited by his failure to appear because it was a direct result of his failure to appear that he received an acquittal. The Surety breached its agreement and the Bond should be forfeited.

POINT II

THE SURETY'S ARGUMENTS ARE MERITLESS

A

A. Columbia Rule of Criminal Procedure 13(d)(1) does not mandate or permit exoneration.

At oral argument, counsel for Surety argued that Columbia Rule of Criminal Procedure 13(d)(1) mandates exoneration. That is a false statement of law. As set forth below, Rule 13(d)(1) by its own terms, and as interpreted by the Courts, is inapplicable to this case.

Rule 13(d)(1) specifically provides that "At any time before violation that the court finds that there is no further need for an appearance bond, it shall exonerate the appearance bond." (emphasis added). By its own terms, this statute is

inapplicable on its face because Defendant violated the terms of the Bond by failing to appear in Court. Rule 13(d)(1) only applies to a Defendant who complied by making scheduled court appearances... that is not the case here. The statute only applies to release of Bonds "before violations" and in this case we are dealing with a situation that occurred "after the violation." The Surety's reliance upon this Rule is completely misplaced. See, e.g., *People v. Nationwide Surety Ins. Co.* (Columbia Supreme Court 2006) ("Rule 13(d) provides that the court shall exonerate an appearance bond in the event of pretrial dismissal or when other pretrial circumstances ranging from death of the defendant to diversion preclude further need for an appearance bond." (emphasis added). *People v. Weinberger* (Columbia Court of Appeals, 2003) ("Rule 13(d) . . . envisions that there is no requirement to exonerate the bond if a violation of the bond terms took place prior to the dismissal.") (emphasis added).

B. Columbia Rule of Criminal Procedure 13(d)(2) does not mandate or permit exoneration.

At oral argument, counsel for Surety next argued that Rule 13(d)(2) mandates exonerated, but even the most cursory examination of the statute and surrounding case law shows that this Rule is also inapplicable to this case. The Rule provides that "When a prosecution is dismissed, the defendant shall be released from custody, unless he is in custody on some other charge, and any appearance bond exonerated."

First, this rule by its own terms provides for releasing a defendant from custody, and does not apply to a situation where the defendant has fled without an appearance.

Moreover, courts have made crystal clear that this Rule only applies to pre-trial proceedings, and not to trial proceedings as is the situation in the case at bar.

At oral argument, Surety claimed that *People v. Weinberger* (Columbia Court of Appeals, 2003) supported Surety's position, but a review of the case shows nothing of the sort. To the contrary, the case supports the State's position that

the Bond should be released because, as noted, Rule 13(d) only applies to pre-trial proceedings. For example, the Weinberger Court reviewed a case where an indictment was dismissed with prejudice "prior to trial." The Court focused extensively on this fact in concluding that a bond should be released; for example explaining that "The primary purpose of an appearance bond is to ensure the defendant's presence at the time of trial. When, as here, the charges are dismissed prior to trial, the primary purpose of the bond no longer exists, and from that point forward there is no further need for the appearance bond." (emphasis added). The Court further explained that "the main purpose of the appearance bond [is] to ensure the defendant's presence at trial." That very purpose was not satisfied here. Appearance at trial did not occur, the terms of the Bond were therefore violated, and the Bond should be forfeited. There is nothing in the statute or surrounding case law to the contrary.

To the extent Surety seeks to rely on any of the facts in *People v. Weinberger*, they are further distinguishable because the Court's holding in *Weinberger*, by which an bond was exonerated, was done not only before trial, but also under a fact pattern where the defendant's non-appearance was non-prejudicial to the prosecution's case. See e.g. *Weinberger* ("The State was not prejudiced by the non-appearance of appellant at one pretrial conference, which is the only possible violation of the bond terms."). That lack of prejudice in *Weinberger* is a far cry from the facts of this case --- where the Trial Court itself recognized that the Defendant's case was dismissed as a direct result of his non-appearance.

C. The Facts Do Not Support the Court's Exercise of Discretion to Exonerate the Bond.

For the reasons set forth above, contrary to Surety's contention at oral argument, there is nothing in the statutory framework and/or surrounding case law that requires exoneration of the Bond. Surety's next and final argument was that the Court should exonerate the Bond in its discretion.

It is true that the Court has discretion to exonerate a Bond. See Rules of Criminal Procedure 13(e) ("the decision whether or not to exonerate a bond shall be within the sound discretion of the court"); see also e.g. *People v. Saintly Bail Bonds* (Columbia Court of Appeals 2008) ("Once there has been a determination that a defendant failed to appear or otherwise comply with the terms of the appearance bond, except where a statute specifically requires exoneration, the decision to order an appearance bond forfeited or to remit in whole or in part lies essentially in the discretion of the trial court." The *Saintly Bail* case then goes on to list the following factors to be considered by a court in deciding whether or not to exercise its discretion and, as set forth below, those factors do NOT justify exoneration on the facts of this case:

- Factor 1: defendant's willfulness in violating the order to appear: here, Defendant willfully violated the Court's order and failed to appear at multiple hearings, including without limitation a failure to appear at trial;

- Factor 2: whether the surety is a commercial entity: here, the Surety is not a commercial entity; provided, however, the Surety specifically testified at trial that forfeiture of the bond would NOT create an economic hardship upon him; as such, any presumption of favorable treatment towards a non-commercial entity should not be adhered to;

- Factor 3: effort and expense expended by the Surety in trying to locate and apprehend the defendant: here, Surety by his own admission made no effort at all to locate Defendant, who was his own father. In this respect, the Saintly Bail Bonds court further explained that "It is well settled in this jurisdiction that a surety assumes the risk of a defendant's failure to appear."

- Factor 4: the costs, inconvenience and prejudice suffered by the State: here, the State suffered severe prejudice by virtue of expending large sums of money on pretrial and trial proceedings, only to lose based on the Defendant's failure to appear by virtue of having fled notwithstanding the Bond

- Factor 5: the public's interest in ensuring a defendant's appearance: here, the public has great interest in ensuring Defendant's appearance... due to his failure to appear there is a potential drug dealer back on the streets who evaded justice.

A closer look at the facts of the Saintly Bail Bonds case renders it beyond doubt that the Court should not exonerate the Bond in its discretion. In the Saintly Bail Bonds case, the Columbia Court of Appeals found that the trial court did NOT abuse its discretion in refusing to exonerate a bond under a circumstance where the defendant did not appear at trial only because the defendant was incarcerated in another jail. The surety in that case therefore had a much stronger argument than does the Surety in this case as to the circumstance for the non-appearance: the surety in Saintly Bail Bonds couldn't secure the defendant's appearance because the defendant was incarcerated elsewhere; the Surety in this case was unable to secure his own father's appearance because his father fled to evade the law.

CONCLUSION

For the reasons set forth above, forfeiture of the Bond is appropriate and exoneration is not justified.

Respectfully submitted,

Counsel for the State of Columbia

PT: SELECTED ANSWER 2

State of Columbia v. Henry Raymond and Oscar Raymond

Case Number CR - 20180016

Brief in Support of Forfeiture of the Bond

Facts and Issue Before the Court

Henry Raymond (**HR**) was arrested for various drug-related offenses. Oscar Raymond (**OR**), the son of HR, posted a \$45,000 bond for HR. HR failed to appear at his trial on January 30, 2019 and January 31, 2019. Following the State's case, the defense moved for a judgment of acquittal, which was granted. Any further relevant facts are set out with particularity in the arguments below. The issue that the court must decide is whether to order that the bond be forfeited on account of HR's failure to appear at trial.

Overview of the Law and Procedure

The primary purpose of an appearance bond is to ensure the defendant's presence at the time of trial (*People v. Weinberger*) (**Weinberger**). As equity abhors a forfeiture, the law is strictly construed in favor of the surety. However, nonappearance at trial creates a presumption of forfeiture. The burden is then on the surety to establish a case for relief from forfeiture, either because this is mandatory under statute or because the court should so exercise its discretion (*People v. Nationwide Surety Insurance Company*) (**Nationwide**).

Rule 13(d) - Mandatory Exoneration

The law applicable to the mandatory exoneration of bail bonds is derived from Rules 13(d) and 13(e) of the Columbia Rules of Civil Procedure, which govern "the procedure to be followed in cases between arraignment and trial".

Rule 13(d) provides for mandatory exoneration of an appearance bond. It states that, "at any time before violation that the court finds that there is no further need for an appearance bond, it shall exonerate the appearance bond and order the return of any security deposit" (Rule 13(d)(1)). Additionally, Rule 13(d) further provides that "when a prosecution is dismissed, the defendant shall be released from custody, unless he is in custody on some other charge, and any appearance bond exonerated" (Rule 13(d)(2)).

As such, Rule 13(d) establishes two situations in which exoneration is mandatory: first, when, before violation, the court finds that there is no further need for an appearance bond; and second, when a prosecution is dismissed.

Rule 13(e) - Discretionary Exoneration

Under Rule 13(e), in all instances other than those in Rule 13(d), "the decision whether or not to exonerate a bond shall be within the sound discretion of the court" (Nationwide).

This Brief In Support of Forfeiture of the Bond will argue that mandatory exoneration does not apply, and that discretionary exoneration should not be ordered by this court in this case.

Mandatory Exoneration Does Not Apply

First, it is submitted that this case should be treated as falling outside Rule 13(d) altogether, and therefore that mandatory exoneration cannot apply.

Rule 13(d), by its terms, states that it shall "govern the procedure to be followed in cases between arraignment and trial".

As described above, this case in fact proceeded to trial and indeed to judgment on January 31, 2019. As a matter of statutory interpretation, this clearly takes the case outside of Rule 13(d).

Defense counsel argued in the bond forfeiture hearing (**Hearing**) that, as a matter of policy, an equivalent rule to 13(d) should apply following trial, as there should not be a distinction between dismissal and acquittal.

With respect, we find this argument to be absurd as it would fundamentally undermine the existence and purpose of appearance bonds. As outlined above, the purpose of an appearance bond is to ensure that the defendant appears at trial (Nationwide). Defense counsel's argument would mean the surety would recover its bond whenever the defendant was ultimately acquitted, regardless of whether the defendant appeared at trial. This greatly reduces the incentive on the surety to ensure that the accused is present at trial, which is not in the interests of justice and is unfair to the victims of crime.

Additionally, it creates a greater risk of guilty defendants evading justice because of their nonappearance. In the present case, the court found that "there is no substantial evidence to warrant a conviction, based upon insufficient evidence of the identity of the Defendant". This compounds the problem: the surety may become indifferent as to whether the defendant appears at trial, since a nonappearance may increase the likelihood of an acquittal, in which case the surety would be entitled to exoneration. In our opinion, this cannot be in the interests of promoting the integrity of the criminal justice system.

If the court disagrees and finds that Rule 13(d) does apply, there are two situations in which exoneration of the bond is mandatory. We submit that neither of these applies in this case.

Rule 13(d)(1): Before Violation, No Further Need

Rule 13(d)(1) provides that, where at any time before violation that the court finds that there is no further need for an appearance bond, it shall exonerate the appearance bond and order the return of any security deposit.

The Court of Appeals in *Weinberger* gave guidance on the application of the "before violation" and "no further need" requirements in that case. There, the

defendant failed to appear at a pretrial conference, but charges were dismissed on the same day before trial could commence. The Court of Appeal ultimately held that the fact that the violation occurred prior to the pretrial conference did not prevent mandatory exoneration. The Court of Appeals, in construing the "before violation" requirement and the requirement of "no further need", found it relevant that:

- the main purpose of the bond is to ensure the defendant's presence at trial, and this ceased after the dismissal;
- the State was not prejudiced by the non-appearance of the defendant;
- any violation was only for a matter of hours;
- the defendant's presence was not required for any other event prior to dismissal; and
- the issue of forfeiture was not raised by the State.

We therefore argue that Weinberger should be distinguished in this case for the following reasons:

- the need to ensure the defendant appeared at trial does not disappear when there is no dismissal of the charges;
- the non-appearance of the defendant was highly prejudicial to the state; in fact, it was the reason for the acquittal of HR in this case;
- the violation was substantial and for longer than a matter of hours: the first date on which HR was found to have fled was March 23, 2018, so the defendant has been in violation for over a year;
- the defendant's presence was required at multiple occasions: the two pretrial conferences, on the initial trial date in October 2018 and the postponed trial date on January 2019; and
- the State has raised the issue of forfeiture.

Rule 13(d)(2): Dismissal of Prosecution

Under Rule 13(d)(2), the bond must be exonerated when a prosecution is dismissed. Here, there was no dismissal: the trial went ahead and HR was acquitted. We have submitted above why, in our opinion, the court should uphold the distinction between dismissal of prosecution and an acquittal and should not extend mandatory exoneration to acquittals. Finally, as a matter of the plain wording of Rule 13(d)(2), mandatory exoneration does not apply for an acquittal.

Discretionary Exoneration Should Not Be Ordered

As discussed above, under Rule 13(e), the court may exercise its discretion to exonerate the bond. We set out below why the court should not order exoneration in this case.

Factors to be considered by the court

According to the case law, the following factors are relevant to the court's exercise of its discretion under Rule 13(e):

- Whether the surety knew, or should have known, that the defendant was a flight risk (Nationwide);
- Whether the surety acted in the good faith belief that the defendant would appear (Nationwide);
- The defendant's willingness in violating the order to appear (People v. Saintly Bail Bonds) (**Saintly**);
- Whether the surety is a commercial entity (Saintly);
- The effort and expense expended by the surety trying to apprehend the defendant (Saintly);
- The cost, inconvenience and prejudice suffered by the State due to the defendant's absence (Saintly); and

- The public interest in ensuring a defendant's appearance (Saintly).

Application of factors

- *Whether the surety knew, or should have known, that the defendant was a flight risk*

At the Hearing, OR stated that he did not ask his father whether or not he planned to appear at trial. He also stated that his father did not have "many ties" to the community and that none of his family sees much of his father. Finally, OR admitted, when asked that he supposed it was true, that he was aware that there was a "decent chance" that his father would flee.

- *Whether the surety acted in the good faith belief that the defendant would appear*

As mentioned above, OR admitted, when asked that he supposed it was true, that he was aware that there was a "decent chance" that his father would flee. In addition, OR states that he "didn't have much choice" about posting the bond, indicating that he was not motivated by a good faith belief that the defendant would appear, but rather out of familial obligation.

- *The defendant's willingness in violating the order to appear*

OR has provided no evidence that the violation was involuntary; as discussed above, the burden is on OR to rebut the presumption of forfeiture arising from nonappearance.

- *Whether the surety is a commercial entity*

OR is not a commercial entity. However, OR is employed and makes a good living as a software engineer, earning \$120,000 per year. The loss of the \$45,000 bond would not be a significant hardship as OR notes that he has sufficient savings.

- *The effort and expense expended by the surety trying to apprehend the defendant*

OR has provided no evidence that he has expended either effort or expense to apprehend HR. As the court explains in *Saintly*, this is a relevant factor because it encourages the surety to take action and reasonable steps to recapture an absent defendant. OR admits that he has taken no steps to contact his father despite clearly understanding the terms of the agreement and that by signing he would "lose all of the money" he put up.

- *The cost, inconvenience and prejudice suffered by the State due to the defendant's absence*

This factor weighs heavily in favor of the State. As explained at the hearing, the court has endured the cost and waste of time and resources of (1) two pretrial conferences and (2) two wasted days of trial, at which a jury was impaneled, witnesses testified and evidence was admitted. Finally, as mentioned above, the acquittal itself was a result of HR's nonappearance. This amounts to significant prejudice to the State.

- *The public interest in ensuring a defendant's appearance*

Again, the public interest in favor of ensuring HR's appearance at trial is strong and is the basis of the need for appearance bonds. In this case, HR was charged with dealing cocaine, a serious offense for which the public has an interest in securing justice.

Conclusion

In conclusion, we argue that:

1. The present case should be treated as falling outside of the rules under Rule 13(d) regarding mandatory exoneration as this case went to trial, and did not end in a dismissal, and further there are strong policy reasons for not extending the remit of Rule 13(d) to acquittals;

2. Alternatively, if the court finds that this case does fall within Rule 13, exoneration is not mandatory in this case because the need for the appearance bond continued long after the initial violation by HR, and again the scope of mandatory exoneration should not be extended to acquittals; and
3. Finally, the court should not exercise its discretion to exonerate the bond, in particular because of the significant cost, inconvenience and prejudice suffered by the State due to HR's absence.