2-16-2010

Two Jinn, Inc. v. District Court Cross Appellant's Reply Brief Dckt. 36476

IN THE SUPREME COURT OF THE STATE OF IDAHO

TWO JINN, INC, a California corporation duly qualified to do business in Idaho and doing business as Aladdin Bail Bonds and Anytime Bail Bonds; JAMES GARSKE; and SHANTARA CARLOCK, Plaintiffs-Respondents-Cross-Appellants, vs. DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO; DARLA S. WILLIAMSON, in her official capacity as Administrative District Judge for the District Court of the Fourth Judicial District; LARRY D. REINER, in his official capacity as Trial Court Administrator for the District Court of the Fourth Judicial District; and DIANE BURRELL, in her official capacity as Assistant Trial Court Administrator for the District Court of the Fourth Judicial District, Defendants-Appellants-Cross-Respondents.	Supreme Court Case No. 36476

REPLY BRIEF OF CROSS-APPELLANTS

Appeal from the District Court of the Fourth
Judicial District of the State of Idaho
In and For the County of Ada

HONORABLE JAMES F. JUDD
Presiding Judge

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES AND RULES

DOCKETED CASES

OTHER AUTHORITIES

II. ARGUMENT

A. The District Court Erred in Concluding that the Fourth District Can Lawfully Require Bail Agents to Submit to Criminal History Checks

The legislature appropriately exercised its police power by conditioning bail agents' license on a character and fitness evaluation. Conversely, regulating individual bail agents' character and fitness is neither a procedural function within the court's rule-making authority nor within the ADJ's administrative supervision over the operation of the district courts.

In defending the lawfulness of the supplemental criminal history check,[1] the Fourth District contends that the Idaho Bail Act[2] represents the legislature's transfer of power from the courts to bail agents and that it must determine bail agents' character and fitness in light of its purported "daily interaction" with bail agents and the potential for abusive bail practices. As set forth herein and in the Bail Plaintiffs' previous briefing, statutes and court rules recognizing that a bail bond issued by a qualified corporate surety is "sufficient" do not interfere with the Fourth District's inherent authority. Additionally, neither abusive practices nor daily interaction with bail agents justify the Fourth District's insistence on supplementing the DOI's evaluation of bail agents' character and fitness. Accordingly, this Court should reverse the district court's conclusion that the Guidelines can lawfully require bail agents to submit to supplemental criminal history checks.

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[1] The Fourth District incorporates its briefing in its appeal in response to the Bail Plaintiffs' first issue on cross-appeal. We reply accordingly to this incorporated briefing.

[2] Idaho Session Law 2009, ch. 90, § 2, eff. July 1, 2009.

1. The Idaho Bail Act and Idaho Criminal Rules do not invade the Fourth District's inherent authority

In contending courts have inherent authority to determine which bail agents "operate in their courtrooms," the Fourth District cites to *Leader v. Reiner*, 143 Idaho 635, 639-40, 151 P.3d 831, 836-37 (2007), in which the Supreme Court referenced the court's former authority to determine the sufficiency of private sureties pursuant to I.C. § 19-2909. Appellants' Brief, pg. 14. In *Leader*, the Court noted that bail bonds did not exist when then applicable bail statutes were enacted and instead, at that time, a defendant could post bail in cash or "have two sufficient sureties execute and acknowledge before the judge the undertaking of sufficient bail. I.C. § 19-2909." 143 Idaho at 639, 151 P.3d at 836. Since the *Leader* decision, I.C. § 19-2909 was repealed and replaced with the Idaho Bail Act, which explicitly defines a bail bond as a "sufficient" surety and no longer authorizes courts to determine the sufficiency of individual sureties. I.C. § 19-2907; Idaho Session Law 2009, ch. 90, § 2.

The Fourth District alleges the Bail Act represents a "legislative trend" revealing "a transfer in power from the courts to bail agencies and individual bail agents" and though it is one thing to repeal old legislation, "it is quite another when the Legislature passes new bail laws that conflict with Guidelines issued pursuant to an Order of the Idaho Supreme Court, precluding courts from regulating in an area that has historically been reserved for the courts." Appellants' Reply Brief, pg. 1, 3. However, as noted by the district court in its Memorandum Opinion and Order, in 1979, the Idaho "Supreme Court explicitly recognized the posting of bail by use of surety bond" when it adopted the Idaho Criminal Rules and Misdemeanor Rules. R. (Vol. III) pg. 453-54. Before the 2009 amendments, I.C.R. 46(d) provided that a "bail bond issued by a

qualified corporate surety" could be given as security and "prohibited the court from requiring that "bail be posted only in cash" or from specifying differing amounts for bail depending upon whether it was posted "by corporate surety" or other means.[3]

Contrary to the Fourth District's contention that the Bail Act gave "more power to bail agencies and individual bondmen, and has taken that power from the courts" [Appellants' Reply Brief, pg. 3], the Bail Act simply updated bail statutes to apply to commercial bail bonds as had been provided for decades earlier in the Idaho Criminal and Misdemeanor Rules and Title 41 of the Idaho Code. As the *Leader* Court provided: "modifying the statutes to make them applicable to bail bond agents and surety companies is the province of the legislature." *Id.* at 640, 151 P.3d at 837. Further, in adopting court rules recognizing that a properly qualified bail bond is a sufficient surety, this Court did not improperly invade any inherent authority to determine the "sufficiency" of sureties held by the Fourth District.

Both this Court and the Idaho Legislature have recognized that a bail bond issued by a corporate surety is a "sufficient" surety. Therefore, the Fourth District lacks the authority – inherent or otherwise – to further assure the sufficiency of such bail bonds by requiring individual bail agents to become a second surety on the bail bond and regulating those agents' character and fitness.

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[3] Idaho court rules and statutes are thus distinct from those in extra-jurisdictional cases relied on by the Fourth District, including *Peak v. Richardson*, No. 1:06cv0176 TCM, 2008 WL 762110 (E. D. Mo. 2008)(unpublished) (discussing conflict between court rule authorizing circuit judge to determine whether "surety" on bail bond is "reputable" and insurance statutes). Additionally, the Fourth District's reliance on cases discussing judicial authority to determine the sufficiency of a *surety* and its argument that surety bail agents retain the common law authority of the "bail" [Appellants' Reply Brief, pg. 10-11] is somewhat inconsistent with its insistence that the Guidelines do not make bail agents "co-sureties."

2. No abusive practices demonstrate the need for criminal history checks in addition to those conducted by the DOI

In reliance upon a footnote in a law review article, the Fourth District claims that court regulation of bail agents is necessary because of widespread "abuses and corruption in the commercial bondsman system, including infiltration of criminals and organized crime into the bonding business, bondsman payoffs to police and court officials and failure to pay off forfeited bonds." Appellants' Reply Brief, pg. 4, *citing* to Peggy M. Tobolowsky, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditions*, 19 New Eng. J. on Crim. & Civ. Confinement 267, 275, n.40 (Summer 1993). This claim is not credible nor is it even supported by the law review article itself.

First, the substantial record in this case is entirely devoid of any evidence of abuses or corruption. Indeed, this litigation was pursued by the Bail Plaintiffs after adverse action was taken by the Fourth District against Aladdin bail agents over matters such as a dog at large citation [App. Exh. 12], a seven year old withheld judgment for a misdemeanor [App. Exh. 16, exh. 1-3] and a dismissed juvenile proceeding [App. Exh. 25, Exh. A].

Second, the footnote of the law review article quoted by the Fourth District concerned the evolution of the American system of pretrial release and specifically, the results of studies in the *first half of the twentieth century* of the administration of bail in three cities, Chicago, New York and Philadelphia. Peggy M. Tobolowsky, *Pretrial Release in the 1990s*, 19 New Eng. J. on Crim. & Civ. Confinement at 275. The study in Chicago, for example, occurred in 1927. According to this article, the concerns for greater individualized determination of bail were addressed in 1946 with the adoption of Rule 46 of the Federal Rules of Criminal Procedure. The

Fourth District makes no mention of the foregoing in its sweeping reliance upon this language. Suffice it to say, comparing bail issues which existed in Chicago in the 1920's prior to the adoption of Fed. R. Crim. Proc. 46 with modern bail in Idaho is simply unpersuasive. It certainly speaks volumes that the Fourth District has no evidence of corruption in the record to support its argument that court regulation of bail agents as provided for in the Guidelines is necessary to prevent corruption. It instead relies upon studies from over a half century ago at a time when the bail system was much different and in places like Chicago, "payoffs to police and court officials" were a concern.

Moreover, contrary to the Fourth District's contention that "unscrupulous bail agents could easily run amok, writing one bad bond after another" if it lacked the authority to regulate those agents [Appellants' Brief, pg. 27], the district court held that the Fourth District may prevent a bail agent from posting bonds "where the surety on whose behalf the bail agent is currently seeking to post bonds has an outstanding forfeiture, is precluded from issuing bonds or is financially insolvent" [R. (Vol. III) pg. 496]. The Fourth District inexplicably contends that the Bail Plaintiffs' reliance on this provision of the district court's ruling is inconsistent as "Aladdin asks the Court to strike down this very portion of the Guidelines because, according to Aladdin, it improperly makes bail agents 'co-sureties' on bonds." Appellants' Reply Brief, pg.4.

The Bail Plaintiffs have not challenged either the district court's ruling that the Fourth District may prevent a bail agent from posting bonds on behalf of a defaulting surety [R. (Vol. III) pg. 496] or the section of the Guidelines adopted in response to the declaratory ruling [R. (Vol. III) pg. 547], which provides for an authorized list of sureties. Rather, the Bail Plaintiffs' object to imposing personal responsibility for payment of forfeited bonds on bail agents

individually, and then evaluating bail agents' character and fitness to determine whether an agent is fit, in the eyes the ADJ and TCA, for acceptance of that responsibility.

3. The courts do not have daily interactions with individual bail agents

The Fourth District further contends that it "makes the most sense to have the courts – those interacting with and monitoring bail agents on a daily basis – control those agents' interaction with the court system directly." Appellants' Reply Brief, pg. 5. However, unlike a court reporter [Appellants' Reply Brief, pg. 8] or deputy clerk, a bail agent interacts with and provides a service to the general public and does not provide a direct service to the court. Whereas court reporters literally "operate in courtrooms," other than appearing on motions for relief from forfeiture – which in Aladdin's situation is handled by its general counsel not its bail agents – bail agents do not regularly interact with the court. Thus, it is unclear what "daily" interaction with the court the Fourth District is referring to. Rather, bail agents' assessment of whether they should bind the surety to guarantee a particular defendant's appearance does not take place in the courtroom and, instead, involves interaction with the defendant and his family in the community. Indeed, the Guidelines prohibit bail agents from soliciting business or taking defendants into custody in the courthouse. The county jails, criminal defendants, and their family – not the courts and the TCA – have daily interaction with bail agents.

4. Conclusion

The only potential use for a criminal history check is to evaluate the character and fitness of bail agents. The district court correctly determined that the ADJ may not require bail agents to submit to a character and fitness evaluation and that the substantive licensing procedure set forth in the Guidelines is unlawful. It necessarily follows that the Fourth District cannot require bail

agents to submit to periodic criminal history checks as a condition of their placement on the authorized list. Accordingly, this Court should reverse Paragraph Five of the declaratory judgment and permanent injunction.

B. The District Court Erred in Determining That the Guidelines Provide Adequate Procedural Due Process with Regard to a Bail Agent's Removal Following the TCA's Determination That the Agent Has Not Timely Rectified a Violation Permitting the TCA to Remove the Agent from the Authorized List

1. The Bail Plaintiffs have a protected interest in practicing their professions in the Fourth District

A court order precluding a bail agent from writing bail bonds in a particular county must meet requirements of procedural due process. *State v. AAA Aaron's Action Agency Bail Bonds,* 993 S.W.2d 81, 85 (Tenn. Crim. App. 1998); *see also Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) (liberty, as protected by due process, must be interpreted broadly and certainly encompasses the right of persons to contract and to engage in their chosen occupation); *H & V Engineering, Inc. v. Idaho State Bd. of of Professional Engineers and Land Surveyors*, 113 Idaho 646, 649, 747 P.2d 55, 58 (1987) (right to practice a chosen profession is a valuable property right which cannot be deprived unless one is provided with the safeguards of due process). When the Fourth District removes a bail agent from the authorized list, the Fourth District prevents that agent from practicing his or her profession. Therefore, the Bail Plaintiffs have a protected interest in continuing placement on the authorized list.

The Fourth District cites to two extra-jurisdictional cases, *Tunica County v. Hampton Co. Nat. Sur.*, LLC, ___ So.3d ___, 2009 WL 1232704 (Miss. 2009) and *Hampton Co. Nat. Sur., LLC v. Tunica County, Miss.*, 543 F.3d 221 (5th Cir. 2008), in support of its argument that bail agents have no protected interest in practicing their professions in the Fourth District. Cross-

Respondents' Brief, pg. 3-4. In *Tunica*, a case that did not involve procedural due process, the court concluded that a Mississippi statute gave the sheriff authority to evaluate the sufficiency of a surety. In *Hampton*, which was decided shortly before *Tunica*, the court noted that the plaintiffs would not have an interest protected by procedural due process in writing bonds in a county if the sheriff was found to have the discretion to determine the sufficiency of a particular surety as was at issue in *Tunica*.

Here, neither the ADJ nor the TCA have the discretion to determine the "sufficiency" of a surety or its bail agent. Rather, surety companies meeting requirements set forth by the DOI are authorized to become the sole surety on bail bonds and all courts and judges "shall accept and treat such bond" as "fully and completely complying" with the requirements of law. I.C. § 41-2604. The Bail Act defines a bail bond as a "sufficient" surety and both a statute and this Court's rules prohibit the court from requiring a defendant to post a particular form of "sufficient" surety. I.C. § 19-2907(2); I.C.R. 46(f)(1).

Moreover, the Guidelines have specific criteria for placement on the authorized list which can be contrasted with the type of broad discretion granted officials which precludes a reasonable expectation in a benefit for purposes of procedural due process. The Fourth District acknowledges that bail agents might have a protected interest in their bail agent licenses. Appellants' Brief, pg. 16-17. The criteria for placement on the Fourth District authorized list and a bail agent license through the DOI are substantially identical, the primary distinction being the geographic scope of the authorization – within a judicial district or statewide. *Compare* I.C. § 41-1016(1)(f) & (h) *with* R. (Vol. II) pg. 358, 362. Due process prohibits the unreasonable deprivation of protected interests, whether the government entity causing the deprivation is the

state legislature, county official or court or other subdivision of that state government. Thus, as held by the district court, the Guidelines are "sufficiently similar to a licensing scheme" that "a property right attaches" to bail agents' authorization to post bonds in the Fourth District. R. (Vol. III) pg. 484.

The Bail Plaintiffs have protected interests in continuing to pursue their occupations in the Fourth District and in continuing placement on the authorized list. Thus, this Court should affirm the district court's conclusion that "the bail agent is entitled to due process in any proceeding to add or remove him or her from" the authorized list. R. (Vol. III) pg. 484.

2. Standard

In determining whether the Guidelines comport with procedural due process, the district court cites *American Falls Reservoir Dist. No. 2. v. Idaho Dep't of Water Resources*, 143 Idaho 862, 870-71, 154 P.3d 433, 441-42 (2007), which discussed the "facial" and "as applied" analysis utilized to determine if a statute or administrative rule is unconstitutional. Without citation to authority, the Fourth District broadly asserts that the district court's "facial/as-applied approach often goes hand in-hand with the *Mathews*'[4] balancing test." Cross-Respondents' Brief, pg. 2 n.2. Initially, the district court did not discuss the balancing test and thus did not apply the two analyses together.

Further, the facial/as applied analysis, as traditionally described, is inappropriate when undertaking judicial review of judicial action. In a facial constitutional challenge such as that discussed in the case cited to by the district court – *American Falls Reservoir Dist. No. 2.* – the party must demonstrate that the law is unconstitutional in all of its applications and there are no

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[4] *Mathews v. Eldridge*, 424 U.S. 319 (1976).

circumstances under which the law would be valid. *American Falls Reservoir Dist. No. 2.*, 143 Idaho at 869, 154 P.3d at 440. This deferential standard arises because the judicial power to declare legislative action[5] unconstitutional should be exercised only in clear cases and an appellate court is obligated to seek an interpretation of a statute that upholds it constitutionality. *See Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 237, 207 P.3d 963, 968 (2009), *citing American Falls Reservoir Dist. No. 2.*, 143 Idaho at 869, 154 P.3d at 440. Such separation of powers concerns are of course absent in this Court's review of local judicial guidelines. Regardless of whether the "facial" or "as applied" analysis would have been appropriate in determining whether a statute or administrative rule complies with procedural due process pursuant to *Mathews*, the standard is inappropriate for judicial review of a district court guideline. *See State v. Rogers*, 144 Idaho 738, 741, 170 P.3d 881, 884 (2007) (applying *Mathews* to court action without discussion of facial/as applied analysis).

The Fourth District also contends that the Bail Plaintiffs were required to show that the Guidelines provide for arbitrary and capricious enforcement. Cross-Respondents' Brief, pg. 4-5. The Bail Plaintiffs have not raised a substantive due process claim to the Guidelines. Therefore, it is unnecessary to assess whether the standard to prevail on a substantive due process claim has been met.

3. Due process requires meaningful notice and an opportunity to contest the TCA's determination that a violation has not been rectified

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[5] Administrative rules – as distinguished from district court guidelines – are subject to the same principles of construction as statutes because an administrative rule or regulation is an integral part of the statute under which it originates just as though it were prescribed in terms therein. *See Higginson v. Westergard*, 100 Idaho 687, 690-91, 604 P.2d 51, 54-55 (1979).

Section 14(I)(B) of the Guidelines permits the TCA to remove a bail agent without prior notice following the TCA's unilateral determination that the bail agent failed to timely rectify a violation identified in a previous notice. Although a bail agent can contest the alleged violation before removal, the Guidelines do not provide for notice or an opportunity to contest the TCA's rejection of an agent's attempt to "rectify" the violation. In these situations, the Guidelines fail to provide for *meaningful* notice or the opportunity to be heard at a *meaningful* time. Accordingly, this Court should reverse the portion of the district court's opinion denying the Bail Plaintiffs' request for a declaration that the Guidelines violate procedural due process.

The Fourth District caustically characterizes requiring the TCA to inform a bail agent that it plans to reject the bail agent's attempt to comply with a violation notice as notifying the bail agent "a third time that – yes, the TCA's office really means it – the bail agent is going to be removed from the list." Cross-Respondents' Brief, pg. 7. However, a bail agent is first notified that the TCA believes he or she has violated the Guidelines upon receipt of a "violation notice" such as the January 3, 2006 notice to Mr. Garske. Such a violation notice informs the bail agent that if he or she rectifies the violation within 10 days, the bail agent will not be removed. The notice suggested by the Bail Plaintiffs would not be a "third" or even second notice that the TCA "really means it" but, rather, a meaningful response to a bail agent's attempt to rectify the alleged violation.

The Fourth District contends that "the TCA's office is not a babysitter for delinquent bail agents. It was Mr. Garske's responsibility to provide the documents required under the Guidelines in conjunction with annual renewal of his producer's license; he did not do so." Cross-Respondents' Brief, pg. 10. However, Mr. Garske *did* provide all the required documents

in response to the violation notice. The annual renewal materials include submitting to "a criminal history records fingerprint check completed" by the ISP, submitting a renewal application with a copy of the DOI license and any updated copy of contracts between the agent and the surety. R. (Vol. II) pg. 351. The day after[6] receiving the TCA's violation notice, Mr. Garske submitted to a criminal history check at the ISP and submitted a renewal application with a copy of his updated bail agent license and a copy of the ISP receipt to the TCA. The Guidelines require the TCA to receive the criminal history check results directly from ISP and it will not accept them from the bail agent. R. (Vol. II) pg. 360 (Guideline §12(4): criminal history checks received from address other than ISP will not be accepted). Thus, it was not Mr. Garske's responsibility to submit the criminal history check *results* to the TCA and by submitting the required documents, including verification that he submitted to the required criminal history check, he did everything he was required to in response to the TCA's violation notice. Only the TCA would know whether it received criminal history results directly from the ISP and notice that it intended to reject Mr. Garske's compliance with the violation notice would not have been a redundant "third" notice.

Further, the other 38 agents who were removed because the TCA did not receive Mr. Garske's criminal history results from ISP were not copied on the January 3, 2006 notice to Mr. Garske. Thus, the bail agents other than Mr. Garske who were put out of work for four days received no notice, meaningful or otherwise, that their interest in continuing to work in their professions was jeopardized.

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[6] The violation notice, which was sent via U.S. mail, was received by Mr. Garske the day after it was sent on January 4, 2006. *See* App. Exh. 8, ¶ 14.

Finally, an important aspect of the *Mathews'* balancing test involves balancing the private and government interests at stake. *See Mathews*, 424 U.S. at 334-35. Thus, the amount of notice due and the circumstances in which the deprivation can occur without a prior hearing directly corresponds to the relative weight of the government and private interests at stake. The Fourth District has not identified the grave interest at stake in receiving redundant criminal history checks, such that putting almost forty people out of work for four days without a prior hearing is necessary to protect that interest. Whatever government interest the Fourth District has in receiving criminal history check results is somewhat lessened where, as here, it had a signed declaration that a bail agent had incurred no criminal charges and a receipt demonstrating the agent submitted to the required criminal history check. Weighing the Fourth District's minimal interest in receiving the criminal history results against the significant interest of Mr. Garske, Aladdin and the thirty-eight agents in continuing to earn their livelihood, establishes that due process required a pre-deprivation hearing.

Application of the *Mathews'* balancing test establishes that the procedures for summary removal in Section 14(I)(B) violate procedural due process as a matter of law. Accordingly, the Bail Plaintiffs are entitled to summary judgment in their favor enjoining the Fourth District from enforcing those summary removal provisions and the district court erred in its contrary conclusion.

III. CONCLUSION

For the reasons set forth above and in the Bail Plaintiffs' Cross-Appellants' Brief, the Bail Plaintiffs respectfully ask that this Court reverse paragraph five of the Declaratory Judgment and Permanent Injunction, insofar as it allows the Fourth District to require bail agents to submit

to a criminal history check. The Bail Plaintiffs further ask the Court to reverse the district court's partial denial of their summary judgment motion based on the district court's conclusion that the Guidelines comply with procedural due process.

DATED this 16 day of February, 2010.

NEVIN, BENJAMIN, McKAY & BARTLETT LLP

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16 day of February, 2010, I caused two true and correct copies of the foregoing to be hand delivered to:

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