

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. _____

JAY STEVEN HUBBER,

PETITIONER,

v.

**THE MONTANA SECOND JUDICIAL DISTRICT COURT,
SILVER BOW COUNTY,**

The Honorable Robert Whalen, Presiding,

RESPONDENT.

PETITION FOR WRIT OF SUPERVISORY CONTROL

STATE OF MONTANA v. JAY STEVEN HUBBER, CAUSE NO. DC-2022-12,
MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY, THE
HONORABLE ROBERT WHALEN, PRESIDING

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PETITION FOR WRIT OF SUPERVISORY CONTROL

Jay Steven Hubber petitions the Supreme Court for a writ of supervisory control pursuant to M.R.App.P. 14(3)(a) and (5). This petition is made for the reason that the District Court has erroneously ruled that a bondsman's privilege¹ does not exist in the State of Montana. This ruling is a mistake of law and it prevents the Petitioner, Jay Hubber, from defending the charges of deliberate homicide and aggravated burglary, thereby causing a gross injustice. The issue presented by this petition is whether there is a bondsman's privilege in the State of Montana.

Urgent and emergency factors exist which make the normal appeal process inadequate. Trial is scheduled to begin on Monday, March 4, 2024. Three days ago, on Friday, February 23, 2024, at approximately 4:00 p.m., the District Court issued the order on the State's motions in limine which is the subject of this petition. See, *App.* 1.

¹ *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 371-72 (1872); *State v. Biesman*, 12 Mont. 11, 29 P. 534, 536 (1892).

1. The facts which make it appropriate that the Supreme Court accept jurisdiction.

The majority of criminal defendants charged with a felony in the State of Montana use a commercial surety to post bail. The commercial bail bond functions as a contract between the state, the defendant who promises to appear at a future court date, and the bond agent who acts as a surety of that promise. If the defendant does not appear, a court will forfeit the bond, giving the bond company the right to redeem its value against the defendant. § 46-9-503(3), MCA; *Mitchell*, 412 F. Supp. 3d at 1213.

The bondsman, in exchange for a fee and according to a contract, provides a service, obtaining the principal's release from imprisonment. To obtain the principal's release, the bondsman must pledge to a court that the bondsman will assume responsibility for securing the appearance of the accused at trial. The bondsman thus owes a duty to the court and must suffer financial penalty for failure to perform that duty. In order to secure the principal's appearance at future court proceedings, the bondsman has the right pursuant to the bail contract, common law, and state statutory law to arrest the principal at any time

and at any place and to redeliver the principal into the hands of the public jailor. *Carlson v. Landon*, 342 U.S. 524, 72 S. Ct. 525, 96 L. Ed. 547 (1952); *United States v. Field*, 193 F.2d 92 (2d Cir. 1951), cert. denied, 342 U.S. 894, 72 S. Ct. 202, 96 L.Ed. 670 (1951).

In making the re-arrest, the bondsman need not obtain a warrant, can use agents, can use force, if necessary, and can pursue the principal into any state and bring him back for trial without obtaining extradition. *United States v. Goodwin*, 440 F.2d 1152 (3d Cir. 1971); *Fitzpatrick v. Williams*, 46 F.2d 40 (5th Cir. 1931).

Montana has a commercial bail bond system. After the defendant violates his release conditions, the sureties may “surrender the defendant” in order to avoid being held liable for the full bond amount. § 46-9-510, MCA.

On February 1, 2021, Butte City Court Judge Jerome McCarthy ordered David Sandoval on Pretrial Monitoring, Level 3, in *State v. Sandoval*, TK-215-2021-106. Sandoval was placed under the supervision of case manager, Rachel Verlanic. Documents in Ms. Verlanic’s pretrial services file identifies “815 Main” and “815 South

Main Street, Butte, MT 59701” as an address for Sandoval. See, *App.* 6; Def. Exht. 23.

David Sandoval was then charged in three separate cases in the Second Judicial District Court. The first case, *State v. David Sandoval*, DC-2021-89, Hon. Robert Whalen, presiding, charged Sandoval with felony Theft on May 3, 2021. An arraignment was held on May 19, 2021, but Sandoval failed to appear. *App.* 7; Def. Exht. 11.

Sandoval was next charged on July 19, 2021, with felony Criminal Possession of Dangerous Drugs in *State v. David Sandoval*, DC 2021-164, Hon. Robert Whalen, presiding. *App.* 8; Def. Exht. 13.

A third case filed on August 10, 2021, *State v. David Sandoval*, DC-2021-168, Hon. Kurt Krueger, presiding, charged Sandoval with the felony offense of Burglary. *App.* 9; Def. Exht.15.

Petitioner Jay Hubber was a surety bail bondsman licensed pursuant to § 33-17-201, MCA, under Montana License No. 3000098122. *App.* 10; Def. Exht. 1.

On August 30, 2021, Hubber wrote \$15,000 and \$10,000 bonds for David Sandoval which were posted in Butte City Court. *Apps.* 11, 12,

13, and 14; Def. Exhts. 19, 20, 21, and 22. Sandoval's *Bail Bond Application and Contract* lists his mother's house at 1230 West Porphery [sic], 1330 Cortez, and "815 S. Main" as his addresses. The contract further states that the "[Company] shall have control and jurisdiction over me during the term for which my bails bond(s) is executed *and shall have the right to apprehend and surrender me* to the proper officials at any time for violation of my bail bond(s) obligations to the Court and [Company] as provided by law." (Italics added.) In the contract Sandoval also "consent[ed] *to the application of such reasonable force as may be necessary* to effect such [his] return" to the jurisdiction. (Italics added.) *App.* 15; Def. Exht 18.

A bench warrant was issued on November 10, 2021 in DC 2021-164, after Sandoval failed to appear at his final pretrial conference and did not maintain a GPS monitoring bracelet. The bench warrant was directed to "ANY POLICE OFFICER OR LAW ENFORCEMENT PERSONNEL" and states, "IT IS ORDERED that the Defendant, DAVID SAMUEL SANDOVAL, SR., shall be arrested in any jurisdiction within the State of Montana he may be found. Thereafter,

he shall be brought before this Court for further proceedings in this matter.” *App.* 16; *Def. Exht.* 14.

On October 14, 2021, City Court Judge McCarthy also issued two misdemeanor warrants and forfeited Sandoval’s bond in TK 2021-106 (criminal contempt) and CR 2021-316 (criminal contempt). *Apps.* 17, 18, and 19; *Def. Exhts.* 16, 17, and 33.

Another bench warrant was issued on December 14, 2021 in DC-2021-89 for Sandoval’s failure to appear at his May 19, 2021, arraignment. This warrant also directed the police to arrest Sandoval. *App.* 20; *Def. Exht.* 12.

On December 18, 2021, Hubber sought the assistance of Butte Police Officer Tim McMahon to apprehend Mr. Sandoval from a residence at 735 S. Main, but nobody would come to the door. They cleared the residence without taking Sandoval into custody. *App.* 21; *Def. Exht.* 32.

The following day, on December 19, 2021, Hubber was informed that Sandoval was at 815 S. Main in Butte. At approximately 6:42 p.m. Hubber called Dispatch and spoke with a Dispatcher, Jennifer Bailey.

Hubber advised Bailey that David Sandoval had active warrants and that Hubber was going to 815 S. Main Street to revoke a bond. Hubber asked “who’s on shift tonight?” Bailey responded, Chris Berger, Shawn Brown, Tyler Costello and DJ Lewis, who was actually on a call.

Hubber asked if anybody was free, and Bailey stated that they were all on calls. Hubber then asked that if they became free to swing by and that’s where they would be. Hubber identified the person to be revoked as David Sandoval. The Dispatcher recognized Sandoval’s name and responded that maybe she would have somebody come with him because there were two felonies on him and maybe somebody would like to come with him. Hubber again reasserted that he knew Sandoval was at 815 S. Main. *Apps.* 22 and 23; *Def. Exhts.* 24, 25.

Bailey then called Butte-Silver Bow Law Enforcement Department Sgt. Chris Berger and explained that Jay Hubber had just called and was revoking Sandoval’s bond, who had two felony no-bond warrants and two misdemeanors; four warrants altogether. Sgt. Berger asked, “what does he want from us?” Bailey stated that she was wondering if they should go with him because he’s wanted, and then clarified that Hubber was going to revoke him and bring him in.

Berger responded that Hubber tried to call them “with this shit yesterday” because Sandoval wouldn’t come out of the house and he thought that they could force their way into the house. Berger stated that “he [Hubber] is an idiot. We’re not dealing with his bullshit.” Berger continued, “if he can get him, well, he can bring him to the jail, and we’ll serve the warrants when they get to the jail.” *Apps.* 22 and 23; *Def. Exhts.* 24, 25.

Bailey then called Hubber back and said that she had a skeleton crew and everybody was on a call. She confirmed that Sandoval had two felony and two misdemeanor warrants, and that if Hubber gets into a struggle then she’ll clear somebody and bring to assist. *Apps.* 22 and 23; *Def. Exhts.* 24, 25.

On December 19, 2021, Sandoval was staying at 815 S. Main Street in Butte. He was aware that Hubber was looking for him and that there were active warrants for his arrest. The Complaint in the wrongful death case alleges that Hubber knew that “Sandoval was staying at 815 South Main Street, Butte, MT.” *App.* 24, p. 3, ¶ 8. William Harris was also aware that Sandoval was a wanted fugitive.

After Sgt. Berger refused to provide assistance, Hubber and Nicholas Jaeger went to and entered 815 S. Main without police assistance. They were there to arrest Sandoval. *App.* 3, pp. 14 and 16 (pp. 11 and 13 of Amended Application).

Upon entering the residence they located Sandoval sitting on the foot of the bed near the back door. Hubber deployed his taser, striking Sandoval with the probes. Jaeger said that Hubber was a bondsman. Hubber and Sandoval went to the ground and began wrestling as Sandoval resisted arrest and struggled to prevent Hubber from applying handcuffs. At some point Jaeger took control of the taser and began to stun drive Sandoval. *Id.*

Several other people entered the room and William Harris began kicking Hubber in the head. Jaeger removed Hubber's handgun from Hubber's holster and fired two shots, when Harris yelled "fucking shoot me" and went towards Jaeger, killing him. *Id.*, pp. 10 and 15

Hubber realized that Harris had been shot and touched Harris' head to see if there were any signs of life, exited the bedroom, and called 911 from the phone in the residence. Hubber then exited the

residence and was detained by officers.

David Sandoval jumped out of the window after the shooting occurred. He was later located by Officer Costello. Sandoval was with a female that had come with Hubber, Jacqueline Schwartz, who identified herself as one of Hubber's bond agents. *Id.* 3, p. 7 (p. 3 of the Amended Application.)

Sandoval was taken to St. James Hospital where he was examined by a doctor in the emergency room and medically cleared. He was then transported to the Detention Center where he was held on two felony contempt no-bond warrants and two misdemeanor warrants for contempt. The BSB Law Enforcement arrest report states that the criminal contempt offenses occurred at 815 S. Main St. in Butte. *App.* 19, p. 2; Def. Exht. 33.

Hubber moved to dismiss Count 2 and the District Court denied Hubber's motion, ruling that Sandoval's "bail bond contract does not authorize uninvited entry into a 3rd party's residence." See, *App.* 2, p. 4.

The State filed a motion in limine to prevent Hubber from

arguing that he had the benefit of a bondsman's privilege. The District Court's granted the State's motion, finding that "there is no 'bondsman privilege' in Montana, and as such, entry into the 815 South Main property was unlawful. To allow this entry, would essentially elevate the authority of a bondsman over and above trained law enforcement. The Court is not persuaded that Hubber believed Sandoval lived there. Regardless of the living situation of Mr. Sandoval, the Court is not going to extend a privilege that does not exist in Montana." See, *App.* 1, p. 2.

2. The legal questions and issues involved.

Jay Hubber is charged in Count 1 with Deliberate Homicide in violation of § 45-5-102(1)(b), MCA, the felony murder rule. Count 1 alternatively charges Deliberate Homicide by Accountability in violation of §§ 45-5-102 and 45-2-302, MCA. Count 2 charges Hubber with Aggravated Burglary in violation of § 45-6-204(2), MCA. The Amended Information alleges that Hubber "committed aggravated burglary or any other forcible felony, and in the course of committing an aggravated burglary, W.H. was shot which caused his death." *App.*

3, pp. 1 and 2.

Aggravated burglary is the predicate offense for the felony murder rule charged in Count 1. The underlying or predicate felony is “both an included offense and an element of felony homicide.” *Russell v. State*, 2016 MT 69, ¶ 27, 383 Mont. 60, ¶ 27, 368 P.3d 1171, ¶ 27. Double jeopardy prevents Hubber from being convicted of both offenses. *Id.*, ¶ 26. In order for the felony murder rule to apply, “a causal connection between the felonious act and the death must be present.” *State ex rel. Murphy v. McKinnon*, 171 Mont. 120, 127, 556 P.2d 906, 910 (1976). The State therefore has to prove each element of Aggravated Burglary in order to convict Hubber of felony homicide in this case. *Russell*, at ¶ 28.

A person commits the offense of aggravated burglary if the person knowingly *enters or remains unlawfully* within an occupied structure and knowingly or purposely commits any offense within the occupied structure, and the person purposely, knowingly, or negligently inflicts or attempts to inflict bodily injury upon D.S. by assaulting him and tasing him. (Italics added.) See, MCJI, Instruction No. 6-105 (2022);

§ 45-6-204(2), MCA.

§ 45-6-201(1), MCA, states in pertinent part that “[a] person enters or remains unlawfully in or upon any vehicle, occupied structure, or premises *when the person is not* licensed, invited, or *otherwise privileged to do so*. Privilege to enter or remain upon land is extended either by the explicit permission of the landowner *or other authorized person*.” (Italics added.)

If the State cannot prove the trespass element of aggravated burglary, i.e., that the entry was unlawful, then it cannot obtain a conviction of either Counts 1 or 2 under the felony murder rule theory.

“Defendants have a constitutional right to present a defense. Whether that right is rooted directly in the Due Process Clause, U.S. Const. amend. XIV, or in the Compulsory Process or Confrontation Clauses, U.S. Const. amend. IV, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” *State v. Glick*, 2009 MT 44, ¶ 29, 349 Mont. 277, 203 P.3d 796 (citing *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)). A criminal defendant also has a right to confront the

witnesses against him, arising from the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution. *State v. MacKinnon*, 1998 MT 78, ¶ 33, 288 Mont. 329, 957 P.2d 23. The defendant's constitutional right to present a complete defense and the right to confront the witnesses against him is not an either/or proposition. *State v. Reams*, 2020 MT 326, ¶ 18, 402 Mont. 366, 372, 477 P.3d 1118, 1122.

The District Court ruled erroneously that a bondsman's privilege does not exist in the State of Montana, thereby prohibiting Hubber from defending against the charges. *App.* 1. Contrary to the District Court's ruling, several courts have ruled that there is a bondman's privilege in Montana. Citing § 46-9-510, MCA, United States District Judge Dana Christiansen noted in *Mitchell v. First Call Bail & Sur., Inc.*, 412 F. Supp. 3d 1208, 1213-1214 (D. Mont. 2019) that "Montana law allows commercial bond sureties to arrest and surrender those who have failed to appear in court." *App.* 5. He ruled that "Montana has adopted a common law bondsman's privilege." *Id.*, p. 10. Judge

Christiansen went on to note that § 46-9-510(d)² and *State v. Biesman*, 12 Mont. at 16, 29 P. at 536 (1892) recognize the existence of a bondsman’s privilege in Montana. See, *Mitchell*, 412 F.Supp. at 1217-1218.

In *State v. Baker*, Cause No. DC-17-588, Montana Fourth Judicial District Court, Hon. Robert Deschamps, presiding, held that a surety company’s agents may enter a fugitive’s home for the purpose of arresting him for failing to appear in court. See, *App.* 4, 4:14-20.

Hubber’s exhibits and witnesses will establish – if he is permitted to do so – that Sandoval identified 815 S. Main his address to both Hubber, Rachel Verlanic, and others. Hubber was informed that Sandoval’s address was at 815 S. Main, and he learned that Sandoval was “staying” there as alleged in the wrongful death complaint. Hubber therefore had the right to enter the residence to effect Sandoval’s arrest. Before doing so he twice sought the assistance of

² In 2023 the Montana Legislature passed House Bill 62 which required the licensing of surety bail bondsmen. See, § 33-17-212(5)(f), MCA. It also amended § 46-9-510(1)(b) to allow a licensed “surety bail bond insurance producer” rather than a “surety company” to arrest a defendant.

Butte law enforcement. *Apps.* 21 and 22. Notwithstanding the legal duty imposed by the arrest warrants upon “any police officer or law enforcement personnel” to arrest Sandoval (*Apps.* 16, 20), Sgt. Chris Berger refused, because “[Hubber] is an idiot” and “[w]e’re not dealing with his bullshit.” *App.* 23, 3:24, 25. Hubber was armed with valid arrest warrants, a signed bail contract, the statutory authority of §§ 46-6-502 and 46-9-510(1)(b), MCA, and a common law bondsman’s privilege to forcibly arrest David Sandoval. Hubber was not entering the residence to conduct a search. He was entering the residence for the sole purpose of arresting David Sandoval who listed 815 S. Main as his address and was staying there. That is an important legal distinction. See, *Steagald v. United States*, 451 U.S. 204, 214, n. 7, 101 S. Ct. 1642 (1981) citing *Payton v. New York*, 445 U.S. 573, 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *United States v. Jackson*, 576 F.3d 465 (7th Cir. 2009); *United States v. Underwood*, 717 F.2d 482 (9th Cir. 1983); Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 Hous. L. Rev. 731, 732 (1996); *Livingston v. Browder*, 51 Ala. App. 366,

369, 285 So. 2d 923, 926 (1973), citing 5 Am.Jur.2d Arrest §§ 82, 86; *Sterling v. Albany*, 24 Or. App. 397, 545 P.2d 1386 (1976); *People v. Denson*, 2022 IL App (2d) 200230-U.

The District Judge erroneously ruled that there is no bondsman's privilege in Montana. The District Judge also erred when he reasoned that Harris' right to privacy in his own home obviated a bondsman's privilege to enter a home not his residence, even if that was the address he provided in paperwork and was staying there. To allow this would essentially elevate the authority of a bondsman over and above trained law enforcement. He also erred when, without first hearing a shred of testimony, he stated, "[t]he Court is not persuaded that Hubber believed Sandoval lived there."

Unlike a fugitive fleeing to a medieval Roman Catholic Church and claiming sanctuary or Julian Assange taking diplomatic refuge in the Ecuadorian embassy to avoid arrest, David Sandoval could not lock himself inside William Harris's house to avoid arrest. Harris would have violated § 45-7-303(2)(a) and (d), MCA (Obstructing Justice). To the extent that Harris had a right to privacy in his home, that right

was diminished when he cohabited with and allowed Sandoval to stay in the dwelling, thereby harboring and sharing areas of his residence with a fugitive. Law enforcement, the courts, and society in general had an interest in apprehending Sandoval, a known violator of the law, in order to protect the public. Hubber had the added financial interest of avoiding forfeiture of the bonds he had posted. However, unlike a law enforcement officer, Hubber could not run to court to obtain a search warrant for the purpose of entering the house to arrest Sandoval. In *Payton v. New York*, supra, the United States Supreme Court expressly held “for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” *Id.*, 445 U.S. at 603. As stated above, Hubber had valid arrest warrants, a signed bail contract, the statutory authority of §§ 46-6-502 and 46-9-510(1)(b), MCA, and a common law bondsman’s privilege to arrest David Sandoval. He wasn’t there to search Harris’ house. He was there to arrest David Sandoval.

Like a third-party who allows a probationer to reside in his home,

a third-party who allows a fugitive to stay in his home would artificially raise the fugitive's privacy interest to a level inconsistent with what he would have in his own home. Bail bondsmen should be able to arrest fugitives for whom an arrest warrant founded upon probable cause had been issued when there is reason to believe that the fugitive is within. There must be a factual foundation justifying entry into the dwelling, and the arrest must not be used as an instrument of harassment or intimidation. *State v. Burke*, 235 Mont. 165, 171, 766 P.2d 254, 257 (1988). Under these facts, Harris' diminished expectation of privacy did not override Hubber's right to arrest Sandoval when law enforcement refused to help and Hubber had no means of obtaining a search warrant.

3. Supreme Court Jurisdiction.

Montana Rule of Appellate Procedure 14(3) provides that the Court has supervisory control over all other courts and may, on a case-by-case basis, supervise another court by way of a writ of supervisory control when the case involves purely legal questions, when the lower court is proceeding under a mistake of law and is causing a gross injustice, and when constitutional issues of state-wide importance

are involved. These circumstances are present here because the District Court's order essentially guts Hubber's defenses to the charges. It is also an issue of statewide importance because bail bondsmen exist throughout the entire state in different cities and counties and they frequently come across the same or similar situations.

4. Reasons why the normal appeal process would be inadequate.

The District Court's order prohibits Hubber from presenting evidence and argument to the jury at trial explaining the circumstances surrounding the death of William Harris, this includes Hubber's mental state and his reason for entering the dwelling. Prohibited from defending himself by the District Court's order, Hubber will undoubtedly be convicted. And when he is convicted he will be taken into custody and will likely remain incarcerated until this Court rules on his direct appeal. The normal appeal process is therefore inadequate because he will not be able to secure his release pending appeal since the merits of his appeal is not a factor that this Court can

consider.³ He accordingly requests this Court to grant his petition and accept supervisory control over this case, stay further proceedings pursuant to M.R.App. 14(7)(c), and order more extensive briefing on the issue of whether there is a bondsman's privilege in the State of Montana pursuant to M.R.App.P. 14(7)(b).

DATED this 27th day of February, 2024.

By: s/ Palmer Hoovestal

Palmer Hoovestal
Attorney for Petitioner
JAY STEVEN HUBBER

³ *Gleed v. State*, 311 P.3d 443 (Mont. 2013) (likelihood of success on appeal is not a factor to be considered under § 46-9-107, MCA, in determining whether a defendant should be released on appeal), *cf.*, *State v. Gleed*, 2014 MT 151, 375 Mont. 286, 326 P.3d 1095 (conviction overturned on appeal).

CERTIFICATE OF COMPLIANCE

Pursuant to M.R.App.P. 11(4)(e) and 14(9)(b), I certify that this Petition for Writ of Supervisory Control is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by WordPerfect is 3,946 and not averaging more than 280 words per page, excluding caption, table of contents, table of authorities, and certificate of compliance.

DATED this 27th day of February, 2024.

By: s/ Palmer Hoovestal

APPENDIX

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CERTIFICATE OF SERVICE

I, Palmer Hoovestall, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 02-27-2024:

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