

RESOLUTION 07-02-05

DIGEST

Bail: Requesting Increase in Bail; Consideration of Defendant's Wealth

Amends Penal Code section 1269c to require an affidavit requesting a bail enhancement and to prohibit a bail increase based solely on a defendant's wealth.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Penal Code section 1269c to require an affidavit requesting a bail enhancement and to prohibit a bail increase based solely on a defendant's wealth. This resolution should be approved in principle because the purpose of California's bail system is to assure the defendant's attendance in court and protect the public safety – not to discriminate against financially secure individuals.

Pursuant to Section 1269c, if a peace officer has reasonable cause to believe the amount of bail is insufficient to assure the protection of a victim, or family member of a victim, of domestic violence – or the defendant's future appearances – he may prepare an affidavit and present it to the magistrate. (Pen. Code, §1269(c).) The magistrate may set bail in an amount sufficient to assure the protection of a victim or family member of a victim of domestic violence – or the defendant's future appearances. (*Ibid.*)

An argument can be made that a person with vast financial resources may post a large bail and flee. However, a person with a well-paying job has an incentive to continue to appear in court. Additionally, a defendant with children in the jurisdiction will find it hard to leave. Furthermore, if a person with strong financial ties to the community were to flee, not only would the defendant lose the bail but also any social ties that such wealth brings. Finally, if the court determines the defendant is not a flight risk, the financial well-being of the victim of domestic violence may be impacted by expenditure of unnecessary resources on excessive bail.

Predicating the amount of bail purely on the wealth of a defendant – without considering any other factor – is simply unfair.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1269c to read as follows:

- 1 § 1269c
- 2 If a defendant is arrested without a warrant for a bailable felony offense or for the
- 3 misdemeanor offense of violating a domestic violence restraining order, and a peace officer has
- 4 reasonable cause to believe that the amount of bail set forth in the schedule of bail for that offense is
- 5 insufficient to assure defendant's appearance or to assure the protection of a victim, or family
- 6 member of a victim, of domestic violence, the peace officer shall prepare a declaration under penalty
- 7 of perjury setting forth the facts and circumstances in support of his or her belief and file it with a
- 8 magistrate, as defined in Section 808, or his or her commissioner, in the county in which the offense
- 9 is alleged to have been committed or having personal jurisdiction over the defendant, requesting an
- 10 order setting a higher bail. The declaration must be separate and apart from any probable cause
- 11 declaration submitted in support of the issuance of an arrest warrant. A request for an order setting a
- 12 higher bail made pursuant to this section shall not be based upon or motivated by the defendant's
- 13 actual or perceived financial condition, unless the defendant's financial condition is relevant to any of

14 the factors to be considered by the judge or magistrate pursuant to Section 1275 subdivision (a). The
15 defendant, either personally or through his or her attorney, friend, or family member, also may make
16 application to the magistrate for release on bail lower than that provided in the schedule of bail or on
17 his or her own recognizance. The magistrate or commissioner to whom the application is made is
18 authorized to set bail in an amount that he or she deems sufficient to assure the defendant's
19 appearance or to assure the protection of a victim, or family member of a victim, of domestic violence,
20 and to set bail on the terms and conditions that he or she, in his or her discretion, deems appropriate,
21 or he or she may authorize the defendant's release on his or her own recognizance. If, after the
22 application is made, no order changing the amount of bail is issued within eight hours after booking,
23 the defendant shall be entitled to be released on posting the amount of bail set forth in the applicable
24 bail schedule

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS:

Existing Law: There is no current law requiring a declaration be submitted separate and apart from a probable cause declaration in connection with a request for a bail enhancement. There is no current law prohibiting discrimination against a defendant based solely on his actual or perceived wealth in connection with a request for a bail enhancement, where his wealth is not at issue, where the defendant is not a flight risk, or where his wealth is irrelevant to the factors which may be considered by the court pursuant to Penal Code § 1275.

This Resolution: Seeks to modify Penal Code Section 1269c to require an affidavit submitted in support of a bail enhancement to be a separate document from any probable cause declaration submitted. It also prohibits an officer from seeking a bail enhancement based on his or her perception of the defendant's wealth, or for the purpose of attempting to prevent the defendant from posting bond.

The Problem: All defendants are entitled to bail as a matter of right before conviction except in extremely limited circumstances. See Penal Code § 1271. Bail may not be excessive in amount. Cal. Const., Art. 1, § 12; U.S. Const., Eighth Amendment. Many defendants of means are faced with an enhancement of bail above the presumptive bail set forth in the bail schedule approved by the county based solely on their apparent ability to easily post bond as a result of their actual or perceived financial condition. Bail is not and should not be punitive in nature. Nor should a defendant of means be subjected to a higher bail than a defendant without means for the identical offense, solely based upon his financial condition. A peace officer should not be able to circumvent the provisions of Penal Code § 1271 by having bail set in an amount higher than that reasonably necessary under the circumstances, based solely on the financial condition of the defendant where the financial condition is not relevant.

IMPACT STATEMENT

This resolution does not affect any other laws.

AUTHOR AND/OR PERMANENT CONTACT: Elizabeth L. Bradley, Law Offices of Alan S. Gutman, 9401 Wilshire Blvd., Suite 575, Beverly Hills, CA 90212 (310) 385-0700, ebradley@gutmanlaw.com; Richard D. Kaplan, Kaplan Marino, 9454 Wilshire Blvd., Suite 500, Beverly Hills, CA 90212 (310) 557-0007, kaplan@kaplanmarino.com.

RESPONSIBLE FLOOR DELEGATE: Elizabeth L. Bradley and Richard D. Kaplan.

COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

This resolution hinders one of the primary purposes for setting bail, which is to help prevent flight by an accused. A wealthy defendant has greater temptation and means to flee the jurisdiction. Courts should have flexibility to consider the defendant's wealth in the interest of public safety.