

RESOLUTION 07-03-05

DIGEST

Bail: Failure to Comply with Statute Constitutes Abuse of Discretion

Amends Penal Code section 1270.1 by adding specific guidelines to use in granting a bail deviation.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Penal Code section 1270.1 by adding specific guidelines to use in granting a bail deviation. This resolution should be approved in principle because it requires further adherence to the statutory requirements before bail is enhanced.

The trial court is required to state what its considerations were in setting bail in excess of the bail schedule, and to set bail that reflects the court's conclusions. The court may neither deny bail nor set the bail in a sum that is the functional equivalent of no bail. (See *In re Christie* (2001) 92 Cal.App.4th 1105, 1109.) In addition, the trial court must state explicit reasons for a party on appeal being denied bail. (See *In re Podesto* (1976) 15 Cal.3d 921.) All defendants are entitled to bail unless statutorily prohibited under Penal Code section 1271. *In re Bright* (1993) 13 Cal.App.4th 1664 provides that the charged offense, and not the punishment actually faced, controls the availability of bail.

This resolution would establish statutory authority to ensure that the court does provide specific reasons for setting bail in excess of the bail schedule. The court should exercise great caution before granting a deviation from the bail schedule. The court should follow the formal requirements of the statute and this resolution provides specific guidance for the court to follow to ensure it exercises its discretion appropriately. A defendant who has bail enhanced is in a better position to challenge deviation from the bail schedule with the more specific requirements that this resolution would provide. In addition, the resolution gives greater strength to the requirements by providing that it is an abuse of discretion if the court does not follow the requirements of the statute.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1270.1 to read as follows:

- 1 § 1270.1
- 2 (a) Before any person who is arrested for any of the following crimes may be released on bail in an
- 3 amount that is either more or less than the amount contained in the schedule of bail for the offense,
- 4 or may be released on his or her own recognizance, a hearing shall be held in open court before the
- 5 magistrate or judge: (1) A serious felony, as defined in subdivision (c) of Section 1192.7, or a violent
- 6 felony, as defined in subdivision (c) of Section 667.5, but not including a violation of subdivision (a) of
- 7 Section 460 (residential burglary). (2) A violation of Section 136.1 where punishment is imposed
- 8 pursuant to subdivision (c) of Section 136.1, 262, 273.5, 422 where the offense is punished as a
- 9 felony, or 646.9. (3) A violation of paragraph (1) of subdivision (e) of Section 243. (4) A violation of
- 10 Section 273.6 if the detained person made threats to kill or harm, has engaged in violence against, or
- 11 has gone to the residence or workplace of, the protected party.
- 12 (b) The prosecuting attorney and defense attorney shall be given a two court-day written notice and
- 13 an opportunity to be heard on the matter. If the detained person does not have counsel, the court
- 14 shall appoint counsel for purposes of this section only. The hearing required by this section shall be
- 15 held within the time period prescribed in Section 825.

16 (c) At the hearing, the court shall consider evidence of past court appearances of the detained
17 person, the maximum potential sentence that could be imposed, and the danger that may be posed
18 to other persons if the detained person is released. In making the determination whether to release
19 the detained person on his or her own recognizance, the court shall consider the potential danger to
20 other persons, including threats that have been made by the detained person and any past acts of
21 violence. The court shall also consider any evidence offered by the detained person regarding his or
22 her ties to the community and his or her ability to post bond. The court shall weigh the evidence
23 based upon the specificity of the evidence, the actual knowledge of the declarant, and the possible
24 bias of the declarant. Vague and conclusory declarations alone shall not be the basis for an increase
25 in bail.
26 (d) If the judge or magistrate sets the bail in an amount that is either more or less than the amount
27 contained in the schedule of bail for the offense, the judge or magistrate shall state the reasons for
28 that decision and shall address the issue of threats made against the victim or witness, if they were
29 made, in the record. This statement shall be included in the record.
30 (e) The failure of a judge or magistrate to follow the requirements of this section before setting bail in
31 an amount above the amount contained in the schedule of bail for the offense constitutes an abuse of
32 discretion.

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

PROPOSER: Beverly Hills Bar Association

STATEMENT OF REASONS:

Existing Law: Penal Code § 1270.1 does not provide sufficient guidance to the court as to the weighing of evidence submitted in connection with a bail deviation. Nor does it provide any relief to the defendant should the court fail to comply with the statutory requirements in deviating from the bail schedule in the offenses within the purview of this statute.

This Resolution: Would provide the court with more specific guidelines to use in evaluating the evidence presented and determining whether a bail deviation is warranted. Moreover, it provides teeth to the statute, by declaring it an abuse of discretion for bail to be enhanced when the court fails to comply with the statutory requirements.

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. Bail is not and should not be punitive in nature. The court should use great caution in determining whether a bail deviation is warranted, and should not take the procedural requirements of this section lightly. In the event a defendant finds a challenge to the amount of bail is warranted, he has no basis for such challenge without the formal factual findings required to be made pursuant to this section. The statutory declaration of an abuse of discretion is appropriate where the court fails to follow the statutory procedure. A failure to exercise discretion constitutes an abuse of discretion, and it is warranted to assume the court failed to properly exercise its discretion when it fails to follow the express and precise procedural guidelines provided in this section.

IMPACT STATEMENT

This resolution does not affect any other laws.

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COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

A reviewing court should determine if a judge abused his or her discretion based on the facts of each case rather than have a statute that calls for an automatic abuse of discretion. The legislature should not restrict the decision making ability of a judge when he or she is deciding on matters involving public safety such as in the setting of bail.