

## **PEOPLE v. GRIJALVA**

S229446

Supreme Court of California

September 20, 2015

### **Reporter**

2015 CA S. Ct. Briefs LEXIS 2432

THE PEOPLE, Plaintiff and Respondent, v. OSCAR GRIJALVA, Defendant, FINANCIAL CASUALTY & SURETY, INC., Real Party in Interest.

**Type:** Petition for Appeal

**Prior History:** Court of Appeal Second District - Division 5 No. B251230. Superior Court of California Los Angeles County No. PA071174. Hon. Harvey Giss.

### **Counsel**

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[\*1] John M. Rorabaugh (SBN # 178366), Santa Ana, CA, Attorney for Real Party in Interest and Appellant, Financial Casualty & Surety, Inc.

### **Title**

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Petition for Review

### **Text**

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**TO HONORABLE CHIEF JUSTICE TANI GORRE CANTIL-SAKAUYE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:**

Pursuant to California Rules of Court Rule 8.500, Accredited Surety & Casualty Company respectfully petitions for review the following opinion of the Second Appellate District, Division Five which was filed and certified for full publication August 12, 2015. In the alternative it is requested that this opinion be de-published. A copy of the opinion authored by the Honorable Richard Kirschner, Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution, is attached as Exhibit 1 to this petition.

### **IV. ARGUMENT**

#### **A. The Heightened Good Cause Standard Adopted by the Court of Appeals Does Not Comport with the Public Policy Goals of Penal Code section 1305.4 of Encouraging the Return of Fugitive Defendants to Custody**

In the *Ranger* and *Alistar* cases, the court phrased the necessary showing for good cause as requiring "(1) an explanation of what efforts the surety made to locate the defendant during the initial 180 days, and (2) why such efforts were unsuccessful." (*Alistar, supra, 115 Cal.App.4th at p. 127.*)

It is hard to see how the policy of returning fugitive defendants to custody is served by stopping diligent, competent investigations. As noted by another court, "[t]here is a public interest at stake here as well-the [\*16] return of fleeing defendants to face trial and punishment if found guilty. Given the limited resources of law enforcement agencies, it is bail bond companies, as a practical matter, who are most involved in looking for fugitives from justice." (*People v. Am.*

Contractors Indem. Co. (2007) 152 Cal.App.4th 661, 666.) Thus, the State is a primary beneficiary of an ongoing diligent investigation to return a fugitive to custody. Even a small chance of success is beneficial. There can be circumstances where this might be inappropriate to grant such an extension, such as when a defendant has voluntarily fled to a country without an extradition treaty with the United States. But, in a situation like that, the bondsman has nothing left that they can reasonably do. As long as there is activity that the bondsman can diligently perform, public policy favors continuing that activity. The burden should be on the People to demonstrate that further efforts would be unproductive.

Where the underlying policy favors a finding of good cause, courts have shifted the burden to the other side to produce evidence to show why there is not good cause.

[I]n view of the policy favoring [\*17] an Indian child's placement according to statutory placement preferences, the party opposing the placement has the burden to show there is good cause not to follow the preferences. (§ 361.31, subd. (j); BIA Guidelines, [44 Fed.Reg. 67584, 67594-67595](#), § F.1, 3 (Nov. 26, 1979).)

(*In re Anthony T.* (2012) 208 Cal.App.4th 1019, fn 6.)

In *Alistar, supra, 115 Cal.App.4th 122*, as modified Jan. 23, 2004, the court noted that the People failed to provide any evidence refuting the good cause showing by the bondsman.

The People, on the other hand, failed to provide any evidence refuting that good cause existed for granting an extension. There was thus no reasonable justification for not allowing Alistar additional time to locate defendant, particularly since the law disfavors forfeitures and favors returning to custody fleeing defendants. Sections 1305 and 1306 are to be strictly construed in favor of the surety to avoid harsh results. [fn omitted]

(*Alistar, supra, 115 Cal.App.4th at p. 129.*)

Since the policies underlying Penal Code section 1305.4 favor the granting of extensions, the burden of [\*18] refuting good cause should fall upon the People. In the present case, like in *Alistar*, no evidence was presented by the County which would refute the good cause established by the bondsman's declarations.

Therefore the original standard requiring an explanation of why the initial investigation was unsuccessful, as established in *Ranger* and *Alistar* and requiring the People to demonstrate a lack of good cause fits more closely with the policies underlying extensions and the Court should adopt that standard.

#### **B. Because the Public Policy Underlying Penal Code section 1305.4 is to Encourage Bail Agents to Locate and Return Fugitives to Custody, the Statutory Phrase "from the date of its order" Should be Interpreted Based on its Plain Meaning**

In evaluating a time period it is essential to determine the first day of that period. In *People v. Taylor Billingslea Bail Bonds (1999) 74 Cal.App.4th 1193* (*Billingslea*), the court found that Penal Code section 1305.4 allowed a 180-day extension from the last day of the original 185-day period. At the time of *Billingslea* all extension motions had to be heard within the appearance period. Thus the *Billingslea* [\*19] standard gave the greatest term of extension available, since the hearing on the motion might occur before the last day of the appearance period. In 1999 Penal Code section 1305 and 1305.4 were amended to allow a hearing within 30-days of the expiration of the appearance period. The language "from the date of its order" was not changed.

This decision fails to distinguish the primary reason for the *Williamsburg* finding—that Penal Code section 1305 and 1305.4 were amended after the *Billingslea* decision to provide for a hearing outside the 185 day window, while retaining the language in Penal Code section 1305.4 that the extension can be granted from the date of the court's order. The court in *Williamsburg* noted "[w]e disagree with this argument, which strains credulity. *Taylor Billingslea* was decided before the California legislature enacted the 1999 amendment. We fail to see how a case decided before a statutory amendment became effective can provide any guidance on its interpretation." (*Billingslea, supra, 74 Cal.App.4th at fn. 7.*)

None of the other authorities relying on *Billingslea* referred to or considered this subsequent statutory amendment. [\*20] (See [People v. Bankers Ins Co. \(2010\) 182 Cal.App.4th 1377, Accredited 1, supra, 137 Cal.App.4th 1349, People v. Granite State Ins. Co. \(2003\) 114 Cal.App.4th 758](#))

When Penal Code section 1305.4 was originally enacted it did not contain any provisions for the conducting of a hearing outside the 185 day period. The 1999 amendments to Penal Code section 1305.4 and Penal Code section 1305, subdivision (i) (renumbered (j)) allowed the hearing of the motion to extend time to be made after the 185-day period and within thirty days of the filing of the motion. While the hearing on the motion does not automatically extend the appearance period, it allows the appearance period to be extended or tolled from the hearing date. Therefore the appearance period is still active on the date of the hearing. "The trial court, having set the motion to extend for hearing on January 23, 2006, retained jurisdiction on that date either to leave the expired exoneration period untouched, or to, in effect, reinstate and extend it." ([People v. Ranger Ins. Co. \(2007\) 150 Cal.App.4th 638, 649](#))

The amended statute provides a time period for [\*21] the Courts and representatives of the State to consider the bail agent's motion. Each case must be evaluated to determine if there is a proper showing, whether the surety made the showing, and whether the state will oppose any motions filed within the appearance period.

In [People v. Indiana Lumbermens Mut. Ins. Co. \(2010\) 49 Cal.4th 301](#) the court recognized that the legislative intent for Penal Code section 1305, subdivision (i) (renumbered 1305(j)) was to ensure that sureties had the full use of their appearance period to locate and apprehend defendants by allowing the hearing to be heard outside the appearance period provided the motion was timely filed.

The sponsor states that bail agents often are not aware that a defendant has absconded until very close to the end of the 180-day period. Agents may be hard pressed to file a motion to toll and extend the 180-day period within those 180 days. The provisions requiring the bail agent to give 10 days notice to the prosecutor prior to the hearing of any motions also impair the bail agent's ability to obtain exoneration of bail. (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 476 (1999-2000 Reg. Sess. [\*22] ) as amended July 6, 1999, pp. 6-7, italics added.)

Thus, the Legislature moved the provision allowing a 30-day grace period for hearings from subdivision (c) to subdivision (i) of section 1305, in order to make it available to sureties moving to toll or extend the 180-day period.

([People v. Indiana Lumbermens Mut. Ins. Co., supra, 49 Cal.4th 301.](#))

Since the enactment of Penal Code section 1305, subdivision (j) (formerly (i)) the courts have struggled to construe the meaning of "from the date of its order" when determining the maximum allowable extension under the statute. Based on a reading of the plain language of the statute "from the date of its order" would mean exactly that-180 days from the date of the order granting the extension of time. Under this interpretation, the bondsman would be entitled to 180-days from the date that the order was entered into, not 180 days from the expiration of the appearance period.

In addition, a problem appears in cases such as the present where the bail agent was initially granted a partial extension, and later filed a second motion requesting the balance of the 180 days which they were entitled to under the [\*23] statute. The *Williamsburg* court analyzed this problem and determined that upon a showing of good cause the bail agent was entitled to a total of 180-days of extended time, and that the time counted from the date of each order. Thus, were a bondsman given a 120-day extension of time, and on the last day of that extension filed a motion to further extend time, at the date of the hearing on the second extension motion the bondsman would be entitled to an additional 60-days, and the time where the motion was pending would not count against that period.

Under the interpretation of *Williamsburg*, the Surety in this case would have been entitled to a further extension of 46 days once they established good cause. In the present case, the court of appeals correctly calculated the length of the initial extension of time to be 134 days from the date of the hearing of March 20, 2013. (Slip. Op. 9) However, the court did disagreed with *Williamsburg*'s interpretation that the bondsman was entitled to receive the full 46-day extension at the August 26, 2013 and

For example, in *Accredited* the court did not specify the maximum term of extension, but refused to allow the bondsman to [\*24] present information obtained after the 185-day period but prior to the hearing which would have been relevant for the establishment of good cause.

Under this decision it is presumed that the bondsman will be allowed to continue an investigation through the 365 day period without reference to the time where the motion is pending outside the 185-day period.

Since the enactment of Penal Code section 1305, subdivision (j) (formerly (i)) the courts have had difficulties construing the meaning of the phrase "may order the period extended to a time not exceeding 180 days from its order" when determining the maximum allowable extension under Penal Code section 1305.4. Based on a reading of the plain language of the statute "from its order" would mean exactly that-180 days from the date of the order granting the extension of time. Under this interpretation, the bondsman would be entitled to 180-days from the date that the order was entered into, not 180 days from the expiration of the appearance period.

### **C. The Court Should be Authorized to Grant a Tolling of Time Under Penal Code § 1305(h) Where a Prosecutor Elects to Extradite and Agrees to the Tolling**

Penal Code section 1305, subdivision [\*25] (h) provides that a Court may toll the exoneration period to allow for the extradition of a fugitive.

**§ 1305(h).** In cases arising under subdivision (g), if the bail agent and the prosecuting agency agree that additional time is needed to return the defendant to the jurisdiction of the court, and the prosecuting agency agrees to the tolling of the 180-day period, the court may, on the basis of the agreement, toll the 180-day period within which to vacate the forfeiture. The court may order tolling for up to the length of time agreed upon by the parties.

(Pen. Code, § 1305, subd. (h), emphasis added.)

Here the court of appeals held that the Surety is not entitled to a *tolling* of the exoneration period pursuant to Penal Code § 1305(h) because the Surety failed to show that the criminal defendant in this case was "temporarily detained, by the bail agent, in the presence of a local law enforcement officer of the jurisdiction in which the defendant is located, *and* is positively identified by that law enforcement officer as the wanted defendant in an affidavit signed under penalty of perjury, *and* the prosecuting agency elects not to seek extradition [\*26] after being informed of the location of the defendant." (County's opposition 4:16-17.) In setting forth this argument the County is outlining the requirements of Penal Code § 1305(g), not Penal Code § 1305(h). Penal Code § 1305(g) reads as follows:

**§ 1305(g).** In all cases of forfeiture where a defendant is not in custody and is beyond the jurisdiction of the state, is temporarily detained, by the bail agent, in the presence of a local law enforcement officer of the jurisdiction in which the defendant is located, and is positively identified by that law enforcement officer as the wanted defendant in an affidavit signed under penalty of perjury, and the prosecuting agency elects not to seek extradition after being informed of the location of the defendant, the court shall vacate the forfeiture and exonerate the bond on terms that are just and do not exceed the terms imposed in similar situations with respect to other forms of pretrial release.

(Pen. Code, § 1305, subd. (g).)

To begin the Surety is not asking for exoneration of its bond, but rather for a tolling in order to expend more resources to aid in the extradition of the defendant. Therefore, the precise [\*27] requirements of Penal Code section 1305, subdivision (g), requiring exoneration of the bond, are not applicable. Moreover, Penal Code section 1305, subdivision (h) is only applicable to cases where prosecutors have made an election to extradite the defendant. Thus, again, Penal Code section 1305, subdivision (g)'s requirement that the "prosecuting agency elects not to seek extradite" obviously is also not applicable to this case. In short, this is *not* a motion to *exonerate* bail pursuant to Penal Code section 1305, subdivision (g), and motions filed under section 1305, subdivision (h) should not be decided based upon the requirements of Penal Code section 1305, subdivision (g).

Instead, this is a motion to *toll* the exoneration period in a case where "a defendant is not in custody and is beyond the jurisdiction of the state" and a tolling of time is needed in order for an international extradition to take place. Hence, this is a case arising out of the circumstances of Penal Code section 1305, subdivision (g). And this is precisely the situation that Penal Code section 1305, subdivision (h) was enacted to address.

The legislative intent for Penal Code section 1305, subdivision [\*28] (h) can be found in the history of California Senate Bill No. 989 (2012), titled "SB 989, Vargas. Bail: extradition." (See: <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml>.) The final amended summary of SB 989 reads as follows:

**SUMMARY:** Provides that, in specified cases, if the bail agent and the prosecuting attorney agree that additional time is needed to return the defendant to the jurisdiction of the court, the court may, on the basis of the agreement, toll the 180-day period within which to vacate the forfeiture for the length of time agreed upon by the parties. Specifically, this bill:

1) Requires, in addition to any other notice required by law, the moving party of a motion to vacate a bond forfeiture or to extend the 180-day period, to give the applicable prosecuting agency a written notice at least 10 court days before a hearing.

2) Provides that the 10-day notice requirement is a condition precedent to granting the motion.

(Cal. S.B. No. 989 (2012), Assembly Floor Analysis.)

Nowhere in the final analysis of SB 989, which became Penal Code section 1305, subdivision (h), is it required that a bail surety fully comply with Penal Code section [\*29] 1305, subdivision (g) in order to obtain a tolling of time. Rather, the focus of Penal Code section 1305, subdivision (h) was to allow for prosecutors and bail sureties to come to an agreement regarding a tolling of the exoneration period in extradition cases - and that prosecutors were properly noticed of such a request.

The Assembly Committee on Public Safety further analyzed the need for Penal Code section 1305, subdivision (h):

**Argument in Support:** According to Two Jinn, Inc. dba Aladdin Bail Bonds, "**This modest bill would allow the court to postpone the forfeiture of bail bonds in cases where additional time is necessary to extradite defendants from foreign jurisdictions. Importantly, the forfeiture could be postponed only when the local prosecutor agrees to a postponement. The bill gives district attorneys complete control over whether any postponements will be granted. The bill also adds a notice requirement so that prosecutors will be informed of any motions brought by bail agents relating to bond exoneration.**

"The bill will further the principal purpose of Penal Code section 1305 by promoting the location and return of fugitives from justice. Under [\*30] the current law, if the 180-day clock is drawing to a close, bail agents may be unwilling to risk the expense of traveling to foreign jurisdictions to attempt to locate a fugitive, even if they have a strong probability of locating him. This is because while they may locate the fugitive within the 180-day window, they know that the extradition process is unlikely to be completed prior to the time at which they must forfeit the bond. In a perverse way, the longer a fugitive can elude authorities, the greater the chance he will escape entirely, because there is an economic disincentive for bail agents to attempt to recapture him. SB 989 will change this to accomplish the original purpose - encourage bail agents to spend every last moment of the 180-day window attempting to locate fugitives."

5) **Argument in Opposition:** According to the California District Attorneys Association, "This association has historically raised concerns about providing bail agents with additional time to avoid the forfeiture of bail given the extensive consideration already provided by current law. That said, **if this bill is amended to clarify that a prosecutor's decision relative to whether the 180-day [\*31] period should be extended is (1) final and (2) not appealable by the bail agent, we would remove our opposition.**"

(Cal. S.B. No. 989 (2012), Assembly Public Safety.)

In the end SB 989 was passed and enacted into law as Penal Code section 1305, subdivision (h) on January 1, 2013 without any language requiring a bail surety to fully comply with Penal Code section 1305, subdivision (g) before Penal Code section 1305, subdivision (h) had any effect. The legislature could have written Penal Code section 1305, subdivision (h) to say in cases "meeting every requirement of [Penal Code section 1305, subdivision (g)]." Instead, the legislature used the

word "arising" and the legislative history is concentrated on the extradition of bail fugitives. In this context the word "arising" in Penal Code section 1305, subdivision (h) makes a lot more sense. That is because if the extradition of fugitive is being sought, it is probably counterproductive to tip that fugitive off to an investigation into the fugitive's whereabouts by requiring a bail surety to "temporarily detain" a defendant and obtain an "affidavit" before a tolling of time can be granted. There is a high likelihood that [\*32] a fugitive that has fled to a foreign country will run further once it is known that investigators have located him/her. In fact the prosecutors Federal and foreign law enforcement are likely to forbid a bondsman from contacting a defendant for which an international warrant is being obtained.

Accordingly, Penal Code section 1305, subdivision (h) allows for a tolling of time as long as prosecutors are properly noticed of such a request and agree to a tolling. In this case, prosecutors were properly notified but did not respond to the request prior to the hearing. If prosecutors agree that the exoneration period should be tolled in this case, Penal Code section 1305, subdivision (h) authorizes the Court to grant such a request. Moreover, as a tolling in this case is being requested so that the Surety can aid in, as well as pay for, the extradition of the defendant, this is exactly the reason that Penal Code section 1305, subdivision (h) was enacted into law.

Here, the Surety is not asking to be discharged from its obligations. The Surety is actually requesting that it be allowed to continue to expend resources to bring the defendant back to Court. The Surety has resources otherwise [\*33] unavailable to prosecutors in this case that the Surety can utilize to aid in the defendant's extradition. "[T]he quantum of proof necessary to support a tolling order is less than that necessary to obtain an actual discharge on the defendant's appearance." ([Cnty. of Los Angeles v. Sur. Ins. Co. \(1984\) 152 Cal.App.3d 16, 23-24.](#)) Should prosecutors in this case agree to a tolling of time, Penal Code section 1305, subdivision (h) allows the court to grant such a tolling.

This decision's blanket prohibition against Penal Code section 1305, subdivision (h) tollings without a Penal Code section 1305, subdivision (g) affidavit is unnecessary and counter-productive. A Penal Code section 1305, subdivision (g) affidavit is one method for bail agents to inform prosecutors of a defendant's location. ([People v. Am. Contractors Indem. Co., supra, 152 Cal.App.4th 661.](#)) This affidavit must be completed in order to obtain an exoneration if the People do not wish to pursue an extradition. However when an extradition is being prepared more discrete methods of identifying defendants are necessary to prevent them from further fleeing. These factors can only [\*34] be properly evaluated by a prosecutor. Therefore the court should not impose a particular method of informing a prosecutor of the location of a defendant when an extradition is being pursued.

## V. CONCLUSION

For all of the above reasons it is requested that the Supreme Court grant review of this matter. In the alternative, it is requested that this opinion be ordered decertified for publication.

Dated: September 20, 2015

Respectfully submitted,

By: /s/ John M. Rorabaugh

John M. Rorabaugh

Attorney for Real Party in Interest and Appellant

## CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **6,399** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by rule 8.204(b) and contains fewer words than permitted by rule 8.204(c), rule 8.360(b), or by Order of this Court.

Dated: September 20, 2015

By: /s/ John M. Rorabaugh

John M. Rorabaugh

Attorney for Real Party in Interest and Appellant

### **PROOF OF SERVICE**

I declare:

At the time of service I was at least 18 years of age and not a party to this legal action. My **business** address is **801 Parkcenter Dr Ste 205, Santa Ana, CA, 92705**.

I served document(s) described as **PETITION FOR REVIEW** as follows:

#### *By mail*

I enclosed a copy of the document(s) identified above in an envelope and **deposited** the sealed envelope(s) with the US Postal Service with the postage fully prepaid.

The envelope(s) were mailed on **September 21, 2015** and addressed as follows:

Los Angeles County Counsel  
Brian Chu, Principal Deputy County Counsel  
648 Kenneth Hahn Hall of Administration  
500 W. Temple Street  
Los Angeles, CA 90012

Los Angeles County Superior Court  
Hon. Harvey Giss, Judge  
210 W. Temple Street.  
Los Angeles, CA 90012

Financial Casualty & Surety, Inc  
3131 Eastside Ct. #600  
Houston, TX 77098

I am a resident of or employed in the county where the mailing occurred. The mailing occurred from **Santa Ana, CA**.

#### *By electronic service*

On **September 21, 2015**, I served from my electronic address (and no error was reported) a copy of the document(s) identified [\*36] above as follows:

Second District Court of Appeals  
Division Five  
(By Electronic Copy)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 21, 2015

By: /s/ Shaylee Kniefl

Shaylee Kniefl

[SEE EXHIBIT 1 IN ORIGINAL]

[SEE EXHIBIT 1 IN ORIGINAL]