
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 1854 **Hearing Date:** June 14, 2016
Author: Bloom
Version: February 10, 2016
Urgency: No **Fiscal:** No
Consultant: JM

Subject: *Bail: Attorney's Fees: Forfeited Bail*

HISTORY

Source: California State Association of Counties; Los Angeles County District Attorney

Prior Legislation: SB 989 (Vargas) – Ch.129, Stats. of 2012
AB 2854 (Dymally) – 2006, Vetoed
SB 1245 (Polanco) – Ch. 434, Stats. of 1995
SB 1649 (Johannessen) – Ch. 170, Stats. of 1994
AB 734 (Johnson) – Ch. 524, Stats. of 1993

Support: California Department of Insurance; California District Attorneys Association;
California Police Chiefs' Association; League of California Cities;
Los Angeles County Professional Peace Officers Association; Los Angeles
County Sheriff's Department; Orange County Board of Supervisors; San Diego
County Board of Supervisors; San Diego County District Attorney; Solano
County Board of Supervisors

Opposition: Orange County Bail Agents Association

Assembly Floor Vote: 74 - 2

PURPOSE

The purpose of this bill is to provide that the district attorney, county counsel, or applicable prosecuting agency that successfully opposes a motion to vacate bail forfeiture shall receive attorney's fees out of forfeited bail money, payable prior to any other distribution of the bail funds.

Existing law states that bail permits a defendant to be released from custody by posting bond, which is a promise to pay the bond amount unless the defendant meets the conditions, which is generally to make all of their court appearances. (Pen. Code, § 1269.)

Existing law entitles defendants to bail prior to conviction as a matter of right unless the offense is punishable by death or a public safety exception is established. (Cal. Const., art. I, sec. 12.)

Existing law states that bail is set by the magistrate at the defendant's first court appearance. (Cal. Const. art. I, section 12; Pen. Code, § 1271.)

Existing law states that judges fix the bail amount according to a countywide schedule which sets bail amounts according to the offense charged. (Pen. Code, § 1269b, subd. (c).)

Existing law allows judges to adjust the bail up or down from the fee schedule when certain conditions exist, but public safety is the primary concern. (Pen. Code, § 1268, 1269c, 1275, 1289.)

Existing law permits judges to attach conditions on bail which, if violated, can result in forfeiture of the bail. (Pen. Code, § 1269c)

Existing law states that a defendant forfeits bail when he or she fails to appear for their court hearing without a valid excuse. (Pen. Code, § 1275, 1305.)

Existing law allows the bail surety agents may contest bail forfeiture by filing a motion to vacate the forfeiture of bail. (Pen. Code, § 1305.)

Existing law states that county counsel, district attorneys or other applicable prosecuting agency shall recover costs incurred when the attorneys successfully oppose a motion to vacate bail forfeiture. (Pen. Code, § 1305.3.)

Existing law holds that costs do not include attorney's fees in bail forfeiture hearings. (*People v. U.S. Fire Ins. Co.* (2012) 210 Cal.App4th 1423, 1426.)

This bill provides that that county counsel, district attorneys or other applicable prosecuting agencies shall recover out of the forfeited bail money attorney's fees, in addition to costs, incurred through successfully opposing a motion to vacate bail forfeiture.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-

Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

AB 1854 would help restore funding for the costs incurred by prosecutorial agencies in litigating bail forfeiture motions. Forfeiture of bail due to failure of a defendant to appear in court is often followed by a counter-motion to challenge the forfeiture. A significant amount of time and costs are involved in opposing these motions, and financially strapped local prosecutors, district attorneys, and county counsels bear the costs. This bill would allow them to recover a portion of those costs out of the forfeited bail money when they have successfully opposed a motion to vacate a bail forfeiture.

Following enactment of Penal Code section 1305.3 in 1993 - directing that the *costs* of the district attorney in a bail forfeiture case be recovered from forfeited bail - prosecutorial agencies successfully recovered attorneys' fees in a number of bail forfeiture cases. For example, in *Lincoln General Ins. Co. & Aladdin Bail Bonds v. Superior Court* (Los Angeles Co. No. NA052587), the Los Angeles District Attorney's Office received \$2,024.95 in attorney fees. Unfortunately, in November of 2012, the Court of Appeal in *People v. U.S. Fire Ins. Co.* (2012) 210 Cal.App4th 1423, 1426, found that the reference in section 1305.3 to "costs" did not include attorney fees, as the usual meaning of "costs" has only encompassed reporter's transcripts and filing costs, not attorneys' fees.

Specifically, this bill would insert the term ‘attorney fees’ into the statute. Prosecuting offices are often financially constrained and currently fund all of these bail forfeiture cases. Since these cases often involve multiple court appearances and unique legal issues, the costs for the hours spent on them by deputy district attorneys are significant. Due to denial of attorney fee recovery, local government prosecutors sometimes avoid bail forfeiture litigation altogether. This bill provides a revenue stream that would otherwise have been lost

2. Abbreviated History of Bail

Bail is a contract for release of a person from jail upon a promise to appear at future court hearings. The promise is backed by a bond issued through a bail agent. A bailed defendant is said to be in the constructive custody of the bail agent. (*Taylor v. Taintor* (1862) (16 Wall.) 83U.S. 366, 372.) “In pre-Norman England, a bondsman ... [could] suffer the same penalty as the fugitive. This ... led to the allowance of rather extreme measures for capture [of the fugitive].” (*Ouzts v. Maryland National Ins. Co.* (1974) 505 F.2d 547, 550.) However, it appears that bail in England was typically posted in the form of pledges of land or property by the defendant personally or by a relative. Commercial bail – bail posted by private businesses for profit – was an innovation of the American frontier in the early 1880s. (Illegal Globally, Bail for Profit Remains in U.S., Liptak, New York Times, Jan. 29, 2008.)

3. Bail Forfeiture

A defendant forfeits the bail they posted when they fail to appear in court or when they do not fulfill the conditions of their bail, such as committing another offense or intimidating witnesses in their case. A motion to vacate forfeiture of bail is simply a motion to seeking a court order to forfeit the bail posted by the defendant. These motions are filed either by defense counsel or the bond surety agent in order to recover the bail funds they posted. When defense counsel, or a surety agent, file a motion to vacate forfeiture of bail, a prosecuting attorney has the option to contest the motion.

4. Distribution of Bail Forfeiture Funds

When bail is forfeited, state penalties, county penalties, special penalties, service charges, and penalty allocations are distributed to the proper funds first. The arresting agency and courts then receive their portions of the bail funds to alleviate their costs. After these distributions are made, the prosecuting attorney who successfully defends a motion to vacate forfeiture of bail can recover their costs. This bill would allow the prosecuting attorneys to recover their attorneys’ fees. After collection of costs (and attorneys’ fees should this bill becomes law), the cities and counties receive the remainder according to Penal Code Sections 1463.001 and 1463.002.