
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: AB 791 **Hearing Date:** June 13, 2023
Author: Ramos
Version: April 26, 2023
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Postconviction bail*

HISTORY

Source: Riverside County Sheriff's Office
Riverside Sheriffs' Association

Prior Legislation: AB 476 (Ackerman), Ch. 570, Stats. 1999

Support: Arcadia Police Officers Association; Burbank Police Officers Association; California Association of Highway Patrolmen; California District Attorneys Association; California State Sheriffs' Association; Claremont Police Officers Association; Corona Police Officers Association; Culver City Police Officers Association; DSA Monterey County; Fullerton Police Officers Association; Golden State Bail Agents Association; Murrieta Police Officers Association; Newport Beach PA; Palos Verdes Police Officers Association; Peace Officers Research Association of California; Placer County DSA; Pomona Police Officers Association; Riverside County District Attorney; Riverside Police Officers Association; Santa Ana Police Officers Association; San Bernardino County Sheriff's Department; Upland Police Officers Association

Opposition: California Attorneys for Criminal Justice; California Public Defenders Association

Assembly Floor Vote: 74 - 0

PURPOSE

The purpose of this bill is to prohibit a person convicted of an offense punishable by life without possibility of parole from being released on bail pending sentencing or appeal.

Existing law prohibits excessive bail. (U.S. Const., 8th Amend. & Cal. Const., art. I, § 12.)

Existing law declares that a person shall be released on bail by sufficient sureties, except for:

- Capital crimes when the facts are evident or the presumption great;
- Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the

court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or

- Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released. (Cal. Const., art. I, section 12.)

Existing law requires the court to consider the safety of the victim and the victim's family in setting bail and release conditions for a defendant. (Cal. Const., art. I, § 28, subd. (b)(3).)

Existing law provides that in setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations. A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail. (Cal. Const., art. I, section 28(f)(3).)

Existing law states that the admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon bail. (Pen. Code, § 1268.)

Existing law provides that if a general verdict is rendered against the defendant, or a special verdict is given, they must be remanded if in custody, or if on bail, they shall be committed to the proper officer of the county to await the judgment of the court, unless, upon considering the protection of the public, the seriousness of the offense charged and proven, the previous criminal record of the defendant, the probability of the defendant failing to appear for the judgment of the court, and public safety, the court concludes the evidence supports its decision to allow the defendant to remain out on bail. (Pen. Code, § 1166.)

Existing law states that after conviction of an offense not punishable with death, a defendant who has applied for probation or who has appealed may be admitted to bail, as follows:

- As a matter of right, before judgment is pronounced pending application for probation in misdemeanor cases;
- As a matter of right, when the appeal is from a judgment imposing imprisonment in misdemeanors cases;
- As a matter of right, when the appeal is from a judgment imposing only a fine; and,
- As a matter of discretion in all other cases. (Pen. Code, § 1272.)

Existing law provides that provides that when exercising discretion, bail pending appeal must be ordered if the defendant demonstrates all of the following:

- By clear and convincing evidence, that they are not likely to flee. The court shall consider: the defendant's ties to the community, including their employment, the duration of their residence, their family attachments and their property holdings, the defendant's

record of appearance at past court hearings or of flight to avoid prosecution, and the severity of the sentence the defendant faces;

- By clear and convincing evidence, that the defendant does not pose a danger to the safety of any other person or to the community. The court shall consider, among other factors, whether the defendant was convicted of a violent felony; and,
- That the appeal is not for the purpose of delay and, based on the record in the case, raises a substantial legal question that, if decided in favor of the defendant, is likely to result in reversal. A “substantial legal question” means a close question, one of more substance than would be necessary to a finding that it was not frivolous. In assessing whether a substantial legal question has been raised on appeal by the defendant, the court shall not be required to determine whether it committed error. (Pen. Code, § 1272.1, subd. (a) – (c).)

Existing law requires the court, in making its decision, to include a brief statement of reasons in support of an order granting or denying a motion for bail on appeal. The statement need only include the basis for the order with sufficient specificity to permit meaningful review. (Pen. Code, § 1272.1, subd. (c).)

This bill prohibits a person convicted of an offense punishable by life without possibility of parole from being released on bail pending imposition or execution of sentence.

This bill requires a judicial officer to remand into custody a person who has been found guilty of an offense punishable by life in prison without the possibility of parole or death.

This bill prohibits a court from authorizing a defendant to be released on bail pending an application for probation or appeal from judgment when the defendant has been convicted of an offense punishable by life without the possibility of parole.

COMMENTS

1. Need for This Bill

According to the author of this bill:

AB 791 is a common sense measure that aims to improve public safety. Addressing ambiguity within our judicial system will improve delivery of justice.

Existing law requires a defendant to be committed to the county once a verdict has been rendered, unless the court concludes that the defendant can remain out on bail. This bill would make it so defendants found guilty of an offense for which they face life in prison, that they be remanded in the county’s custody and not be released.

2. Bail Generally

Existing law provides a process whereby the court may set a bail amount for a criminal defendant. (Penal Code Section 1269b.) Additionally, Section 12 of Article 1 of the California Constitution provides, with limited exceptions for capital offenses and felonies involving

violence or sexual assault, that a criminal defendant has a right to bail and what conditions shall be taken into consideration in setting bail. A defendant may post bail by depositing cash or an equivalent form of currency, provide a security in real property, or undertake bail using a bail bond.

The bail bond is the most likely means by which a person posts bail and is essentially a private-party contract that provides the court with a guarantee that the defendant will appear for a hearing or trial. A defendant pays a licensed bail agent a percentage of the total amount of bail ordered as a non-refundable fee – often an amount in the range of 10%. The bail agent will contract with a surety company to issue a bail bond – essentially, an insurance policy. The bond is issued providing that if the defendant fails to appear, the county will receive the full amount of bail set by the court. The bond is provided to the court and, if accepted, the defendant is released. As designed, the bail system often allows the court to rely on the private sector to ensure appearances and provide a means for the county to be made whole in the event that a person fails to appear.

While the main purpose of a bail bond is to provide some assurance that a defendant will return to court to resolve the pending charges, courts must also consider the danger a released defendant will pose to the public or specific persons if released. Bail is set through a bail schedule that lists preset amounts of bail for various crimes. A committee of judges in each county promulgates the bail schedule for that county. (Pen. Code § 1269b, subd. (c).) In setting the amount of bail for an individual, the court must additionally consider the arrestee's ability to pay the stated amount of bail—and may not effectively detain the arrestee solely because the arrestee lacked the resources to post bail. (*In re Humphrey* (2021) 11 Cal.5th 135, 143.)

A defendant or the prosecution can move the judge presiding over a particular case to raise or lower the amount of bail, or the defendant can request release on his or her own recognizance. (Pen. Code § 1275.) Additional statutory rules apply if the defendant is charged with a serious felony or domestic violence. (Pen. Code § 1270.1.)

3. Bail after Conviction

While the right to pretrial bail is a right provided in the California constitution, the availability of bail after conviction is statutory, not constitutional. (*In re Podesto* (1976) 15 Cal.3d 921, 929-931; *People v. Turner* (1974) 39 Cal.App.3d 682.) Generally, when a defendant has been convicted of an offense, the defendant is to be remanded into custody while awaiting sentencing on the conviction. (Pen. Code, § 1166.) However, after “considering the protection of the public, the seriousness of the offense charged and proven, the previous criminal record of the defendant, the probability of the defendant failing to appear for the judgment of the court upon the verdict, and public safety,” the court may allow the defendant to remain out on bail if it concludes the evidence supports this decision. (*Ibid.*)

Existing law also specifies that a defendant who has appealed a conviction for a non-capital case may be released on bail either as a matter of right in misdemeanor cases, or as a matter of court’s discretion in all other cases. (Pen. Code, § 1272.)

This bill prohibits a court from authorizing a defendant to be admitted on bail after being found guilty of an offense punishable by life in prison without the possibility of parole or death while awaiting sentencing. This bill also expands the prohibition in existing law that makes ineligible for bail pending appeal a defendant who is convicted of a crime punishable by death to also

include a defendant who is convicted of a crime punishable by life without the possibility of parole.

4. Impetus for this Legislation

The impetus for this bill comes from a case out of Riverside County where a man named William McKay, who was out on bail after being convicted of several felonies including a third strike, shot and killed Riverside County Sheriff's Deputy Isaiah Cordero during a traffic stop:

McKay had been out on \$500,000 bail since early 2022. San Bernardino County Superior Court Judge Cara D. Hutson had reduced his bail from \$950,000 over the objection of a San Bernardino County prosecutor, who asked that McKay be remanded into custody after being convicted of several felonies that made him eligible for a life sentence under California's "three strikes" law.

Hutson in November 2021 found McKay guilty of falsely imprisoning and threatening a woman, receiving stolen property and leading police on a high-speed chase. She acquitted him of more serious kidnapping charges.

The judge delayed sentencing as McKay's lawyer challenged the verdict and sought a new trial over revelations that the alleged victim — the prosecution's key witness — was herself facing federal charges of smuggling drugs into the U.S. from Mexico.

Six days after he was arrested in Fontana in October 2022 and then released, McKay was supposed to come to court for a hearing on that request for a new trial. He did not show up. His \$500,000 bond was forfeited and a warrant issued for his arrest, court records show.

Records also show that, two months later, his \$50,000 bail for the Fontana narcotics arrest was exonerated because the San Bernardino district attorney's office had not filed charges. The reason? Lab results were pending.

When an individual is already out of custody, said Fontana Police Sgt. Chris Surgent, the "D.A.'s office will not consider the case for filing until the lab results for the narcotics are conducted, confirmed and sent over with the entire case. ... This is their policy, not ours."

(Winton and Ormseth, *Why a three-strikes felon – on bail twice over – was on the streets, where he gunned down a deputy*, Los Angeles Times (Jan. 7, 2023).)

The trial judge in the case has received public criticism and even calls to resign. However, some legal scholars expressed that such criticism of the judge may not be warranted by the facts of the case. According to the director of criminal justice at the UC Irvine Law School, "The judge heard the testimony and adjusted the bail after finding (McKay) not guilty of the most serious charges (kidnapping), and \$500,000 is a significant bail." (Saavedra, *Criticism of judge in killing of a Riverside County Deputy not so clear legal experts say*, The Press Enterprise (Jan. 7, 2023).) She added, "There's no indication the judge didn't do what a judge is supposed to do: evaluate the facts, evaluate the criminal history and consider bail." (*Ibid.*)

5. Argument in Support

According to the Riverside County Sheriffs' Office, the sponsor of this bill:

Deputy Cordero's life was tragically cut short by a career criminal who unprovokedly murdered him simply because of what his uniform represented — law, order, and justice. Deputy Cordero left behind over 300 grieving family members, left his 4,000 brothers and sisters in tan and green devastated, and left our community in shock.

Deputy Cordero's murder was unfortunately preventable only if the suspect, William McKay, had been behind bars for the serious crimes he had already been convicted of. McKay's criminal history stretched over two decades and he was recently convicted of his third strike. Unfortunately, although McKay was facing a life sentence, the judge lowered his bail and allowed him to roam free. McKay had nothing to lose on December 29, 2022, and made the decision to kill Deputy Cordero rather than face life in prison. If he had been behind bars that day, Deputy Cordero would still be alive proudly serving his community.

6. Argument in Opposition

According to the California Public Defenders Association:

This bill takes discretions away from the courts who know best whether an individual convicted of an offense for which they may be imprisoned should remain out on bail. The judge who presided over the trial, knows the facts, and who will ultimately sentence the individual is in the best position to determine if the individual should remain out of custody or remanded. The trial judge's discretion should not be curtailed. While it would be a rare situation in which a judge would allow someone facing life without parole to be released following a conviction, the judge knows best.

If a judge does set bail, there is a good reason, perhaps the evidence is completely lacking and there is a good chance the person has been wrongly convicted. A judge would only set bail pending appeal for an individual convicted of an offense that carried a life sentence in order to prevent a miscarriage of justice.

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