# S229446

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. _____

THE PEOPLE

Plaintiff and Respondent,

v.

FINANCIAL CASUALTY & SURETY, INC.,

Defendant and Appellant.

Court of Appeal
Second District – Division 5
No. B251230

Superior Court of California
Los Angeles County
No. PA071174
Hon. Harvey Giss

## PETITION FOR REVIEW



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Financial Casualty & Surety, Inc.

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| THE PEOPLE,<br>*Plaintiff and Respondent,*<br><br>v.<br><br>OSCAR GRIJALVA,<br>*Defendant,*<br><br>FINANCIAL CASUALTY & SURETY, INC.,<br>*Real Party in Interest.* | Court of Appeal<br>Second District – Division 5<br>No. B251230<br><br>Superior Court of California<br>Los Angeles County<br>No. PA071174<br>Hon. Harvey Giss |

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

**Cases:**

**Statutes:**



**Constitutions:**



**Court Rules:**



**Other:**

**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.

## I. ISSUES PRESENTED FOR REVIEW

a. Should the good cause standard under Penal Code section 1305.4, require the surety to demonstrate a reasonable likelihood of success, when there is a public policy in favor of encouraging the return of fugitives to court?

b. When a diligent and competent investigation has been found, should the burden shift to the people to show that an investigation is not reasonably likely to succeed?

c. Where the plain language of Penal Code section 1305.4 allows extensions of the 185-day appearance period for up to 180 days from the date of the order, and the order may be issued up to 30 days after the end of the appearance period, may the surety receive extensions beyond 365 calendar days from the mailing of the notice of forfeiture?

d. Does an agreement with a prosecuting agency to toll time under 1305(h) for the extradition of a defendant from a foreign jurisdiction require the bondsman to detain the defendant to complete a Penal Code section 1305, subdivision (g) affidavit, even where the prosecuting agency objects to the bondsman contacting the defendant?

## II. WHY REVIEW SHOULD BE GRANTED

California Rules of Court, rule 8.500(b) states that the Supreme Court may order review of a court of appeals decision "[w]hen necessary to secure uniformity of decision or settle an important question of law." Review of this case is necessary for both reasons.

### A. The Heightened Good Cause Standard Adopted by the Court of Appeals Conflicts with Prior Opinions and is Against Public Policy Because it Discourages and Prevents Bondsman from Locating and Apprehending Fleeing Fugitives

The good cause standard adopted by the Court of Appeals in this case conflicts with both prior opinions interpreting good cause under Penal Code section 1305.4 and the underlying public policy of encouraging the return of fugitives to custody. In no prior case has a reasonable likelihood of success been given equal weight to the diligence of the investigation. Here, the court found that "[t]o constitute good cause both due diligence and a reasonable likelihood of recapture must be shown. [citations omitted] Both are equally important circumstances in determining 'good cause.' (Accredited, supra, at p. 1358)." (Slip

Op. p. 7) This is an incorrect characterization of the holding in *People v. Accredited Sur. & Cas. Co., Inc.* (2006) 137 Cal.App.4th 1349 *(Accredited 1),* and directly conflicts with the analysis of good cause under *Accredited 1.* The *Accredited 1* opinion specifically stated "It is more vital to the good cause inquiry, and therefore essential, that the surety shows it has been diligently attempting to capture the defendant during the 180 days." (*Id.* at p. 1356.)

In two of the first cases to analyze the good cause standard under section 1305.4, *People v. Ranger Ins. Co.* (2000) 81 Cal.App.4th 676 *(Ranger),* and *People v. Alistar Ins. Co.* (2003) 115 Cal.App.4th 122 *(Alistar), as modified* (Jan. 23, 2004), 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." (*Id.* at p. 127.) Under the good cause standard set forth in *Alistar* and *Ranger* an explanation of why efforts were unsuccessful goes more toward the competency of the investigation than a forecast of its outcome.

In *Accredited 1* the court modified the good cause standard from *Alistar* and *Ranger* by requiring a showing of a "reasonable likelihood of success" as well as diligence. However, the court in *Accredited 1* was quick to point out that since it is often impossible to know why an investigation is unsuccessful, the diligence of the investigation matters more to the finding of good cause.

> While the reasons why efforts were unsuccessful are relevant to determine whether good cause has been shown, as Accredited points out, an effort to capture

> a defendant is often unsuccessful simply because the defendant was not captured. A surety cannot always know how or why a defendant avoids location and capture. It is more vital to the good cause inquiry, and therefore essential, that the surety shows it has been diligently attempting to capture the defendant during the 180 days.

(*Alistar*, *supra*, 115 Cal.App.4th at p. 1356.)

The present case and *People v. Accredited Sur. & Cas.* (2015) 239 Cal.App.4th 293 *(Accredited 2)* which also has a petition for review pending before the Court, have increased the good cause showing required under Penal Code section 1305.4 in a manner that is inconsistent with the purpose of the statute and requires inappropriate prognostication by the trial court. There is no public policy served by bail agents being forced to stop diligent investigations for the sole reason that the court believes the investigation is unlikely to succeed. Evaluating whether or not an investigation will succeed is impossible. The *Accredited 1* case borrowed a standard for good cause from *Owens v. Superior Court of L.A. Cty.* (1980) 28 Cal.3d 238 but here, unlike in *Owens* there is no countervailing interest of judicial economy. There is no policy of judicial economy that is served by requiring likelihood of success to be of an equal weight to the diligence of the investigation. As pointed out in *Alistar*, there is no benefit to the State in stopping the investigation other than the collection of a forfeiture. (*Alistar*, *supra*, 115 Cal.App.4th at p. 129.) As noted in *Accredited 1* it is often impossible to know why efforts are unsuccessful. The diligence of the effort is the more important inquiry.

The courts to date have struggled to define good cause within this context. This is made clear in this decision and *Accredited 2* where the court also held that the likelihood of success is a factor that should be weighed heavily even in the face of a competent and diligent investigation. This Court has not articulated a standard for good cause under Penal Code section 1305.4, and review of this Court is therefore necessary to determine precisely what that standard should be.

### B. This Decision Conflicts With *Williamsburg* and the Plain Language of Penal Code section 1305.4 by Limiting the Bondsman's Extended Appearance Period to 365 Calendar Days

Penal Code section 1305.4 states, in pertinent part: "The court, upon a hearing and a showing of good cause, may order the period extended to a time not exceeding 180 days from its order. A motion may be filed and calendared as provided in subdivision (j) of Section 1305."

This decision holds that the maximum extension provide by Penal Code section 1305.4 is 365 days from the date of the mailing of the notice of forfeiture. In so holding the decision expressly disagrees with the recent decision of *Cnty. of Los Angeles v. Williamsburg Nat'l Ins. Co.* (2015) 235 Cal.App.4th 944 (review denied) and the plain language of Penal Code section 1305.4.

This gives us four distinct interpretations on how to calculate the 180-day period to extend time. In the most restrictive sense the bondsman would get a maximum of 365 days but would not

be allowed to present evidence of investigative activity which occurred while the motions were pending. The second interpretation is that the bondsman gets 365 days but can use evidence of activities conducted while the hearing was pending to establish good cause. The third interpretation is that the bondsman gets 180 day extension from the date of the first hearing on a motion to extend time, but the time remains active while any additional extension motion is pending. The fourth interpretation is that the bondsman is entitled to 180 active investigative days, and the time while motions are pending do not count against that total 180-day period.

In this case, the notice of forfeiture was mailed on August 24, 2012. The 185th day after that mailing was February 25, 2013. On February 20, 2013, Surety filed its first motion to extend the exoneration period pursuant to section 1305.4. On March 20, 2013 the court granted the extension motion and ordered time extended to August 1, 2013. On August 1, 2013 the surety filed a motion to further extend time, or in the alternative toll time. This motion was heard and denied on August 26, 2013. (Slip Op. 3).

Therefore, depending on which of the four interpretations of the 180-day extension period is used in the calculation, the August 26, 2013 hearing date was either (a) the last day of the bondsman's 365 day period; or (b) the 159th day of the extended period, thus entitling the surety to 21 additional active days; or lastly (c) the 134th day of the appearance period, thus entitling the surety to 46 additional active days.

As noted in this decision, the Court has never directly addressed the issue of what "180 days from its order" means in the context of extending time under Penal Code section 1305.4.

The Court of Appeals below noted that the Court stated in dicta in *People v. Am. Contractors* (2004) 33 Cal.4th 653 that "the trial court may . . .extend the period by no more than 180 days from the date the trial court orders the extension." (*Id.* at p. 658.) The court further stated "... the opinion is devoid of any analysis of whether "from its order" means 180 days from the last day of the appearance period, or 180 days from the date of a subsequent order extending the appearance period." (Slip. Op. 14). Therefore the court in this case recognized that there is an ambiguity in the statute that leads to several possible interpretations of "from its order" in this context.

It is clear from the above analysis that review by this Court is required to determine which of these interpretations is correct, thus ensuring consistency of decision from the lower courts, and avoiding unnecessary litigation.

### C. This Opinion Raises an Important Question of Law Regarding What Information a Bondsman is Required to Provide to a Prosecuting Agency to be Entitled to a Tolling of time Under Penal Code section 1305(h).

The legislature enacted California Penal Code section 1305 and related provisions governing bail forfeiture in furtherance of this State's long established policy of disfavoring bail forfeiture:

> The law traditionally disfavors forfeitures and this disfavor extends to forfeiture of bail . . . Thus, Penal Code sections 1305 and 1306 dealing with forfeiture of bail bonds must be strictly construed in favor of the surety to avoid the harsh results of a forfeiture.

> The standard review, therefore, compels us to protect the surety, and more importantly the individual citizens who pledge to the surety their property on behalf of persons seeking release from custody, in order to obtain the corporate bond. . . . Sections 1305 and 1306 are said to be 'jurisdictional prescriptions.' . . . 'Failure to follow the jurisdictional prescriptions in sections 1305 and 1306 renders a summary judgment on the bail bond void . . .'
>
> . . . '[i]t is well established in the case law that Penal Code sections 1305 and 1306 are subject to precise and strict construction.'

(*People v. Nat'l Auto. & Cas. Ins. Co.* (2002) 98 Cal.App.4th 277, 287–288.)

> The object of bail and its forfeiture is to ensure the attendance of the accused and his obedience to the order and judgment of the court. In matters of this kind, there should be no element of revenue to the state nor punishment of the surety.

(*People v. Wilcox Ins. Co.* (1960) 53 Cal.2d 651, 657; *People v. Calvert* (1954) 129 Cal.App.2d 693.)

Consistent with this policy, the legislature recently enacted Penal Code section 1305, subdivision (h), which allows the surety and/or bail agent to request an order tolling the 180-day period to set aside bail forfeiture. Penal Code section 1305, subdivision (h) reads as follows:

> § 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).)

This statute allows the courts to avoid imposing a highly prejudicial forfeiture when a surety and a prosecuting agency have agreed that a tolling of time is needed to extradite a defendant and return them to the jurisdiction of the Court. An international extradition is exactly the type of scenario that Penal Code section 1305, subdivision (h) was designed to address. The extradition process can be lengthy and it is often unlikely that it can be completed within the fully extended appearance period even when the defendant is located and an extradition decision is made immediately. It can take years to get approval for an international arrest warrant. (See 7 FAM 1629 State Department)

The present case presents the question of how Penal Code section 1305, subdivision (g) and section 1305, subdivision (h) relate to each other, as Penal Code section 1305, subdivision (h) contains the phrase "[i]n cases arising under subdivision (g)." Penal Code section 1305, subdivision (h) was intended to give the prosecutors more control over the bail forfeiture process while an extradition is in process. This decision artificially limits the prosecutor's authority by requiring the bail agent to complete a Penal Code section 1305, subdivision (g) affidavit prior to being

entitled to a tolling of time under Penal Code section 1305, subdivision (h) even where the prosecutor does not want the bail agent to detain the defendant.

Accordingly, this Court's review is necessary to fix the system by settling an important question of law, as well as creating uniformity of law between the intent of the legislature and decisions of the Court of Appeal.

## III. STATEMENT OF THE FACTS AND CASE

On February 29, 2012, Financial Casualty & Surety, Inc., through its agent, Bail Hotline, posted bail bond No. FCS1250–929280 for the release of defendant Oscar Grijalva from custody pending criminal proceedings against him. (CT 23–24; Slip Op. at 3). On August 23, 2012, the defendant failed to appear in court, and the bail was declared forfeited and a bench warrant issued. (CT 31; Slip Op. at 3). A notice of forfeiture was mailed on August 24, 2012. (CT 32; Slip Op. at 3). The 185th day after such mailing was February 25, 2013. (*Ibid).*

On February 20, 2013, a motion to extend the exoneration period pursuant to section 1305.4 was filed. (CT 34–36; 1–33; Slip Op. at 3). At the hearing on March 20, 2013, the trial court ordered the period extended 134 days to August 1, 2013. (CT 38; Slip Op. at 3).

On August 1, 2013, a second motion to extend the exoneration period, or in the alternative to toll the time, was filed. (CT 52–53; 39–67; Slip Op. at 3). The motion was supported by the

declaration of the surety's investigator, Cesar McGuire which detailed the diligent and extensive investigation that he had conducted. (CT 64-60; Slip Op. at 4-5).

The motion was heard on August 26, 2013, at which time the trial court denied the motion. (CT 71; Slip Op. at 5). Despite the "considerable efforts" made by the investigators to locate the defendant the trial court did not believe that there was a reasonable likelihood of success in capturing him. (Slip Op at 6). In denying the motion, the trial court explained that the "365 days have long expired" and that the "year has run out." (RT2 B-1:17–21). A notice of appeal was filed on August 26, 2013. (CT 72–74; Slip Op. at 6). Summary judgment on the forfeiture was entered on September 4, 2013. (CT 75–76).

On August 12, 2015 the Second District Court of Appeals affirmed the ruling of the trial court in a published opinion. On September 8, 2015 the Court of Appeals denied Appellant's petition for re-hearing.

## 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 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 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.l, 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 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* 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. (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 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.) 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 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 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 (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 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 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 (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. 898 (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 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 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 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 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 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 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.

Respectfully submitted,

Dated: September 20, 2015

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

# EXHIBIT 1

Filed 8/12/15

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE



THE PEOPLE

Plaintiff and Respondent,

v.

FINANCIAL CASUALTY & SURETY, INC.,

Defendant and Appellant.

B251230

(Los Angeles County
Super. Ct. No. SJ003872)

APPEAL from an order of the Superior Court of Los Angeles County, Harvey Giss, Judge. Affirmed.

E. Alan Nunez for Defendant and Appellant.

Office of the County Counsel, Brian T. Chu, Principal Deputy County Counsel, for Plaintiff and Respondent.

Financial Casualty & Surety, Inc. (Surety) appeals the trial court's order denying its second motion to further extend the appearance period under Penal Code[1] section 1304.5 or, in the alternative, to toll the running of time on the extended appearance period. Surety argues the trial court abused its discretion in denying its second extension motion and maintains that the 180-day extension permitted by the statute is to be measured from the date the court granted the first extension, rather than the date the exoneration period would have expired in the absence of an extension. Surety failed to demonstrate good cause to justify a second extension. We affirm.

## STATUTORY SCHEME

"[T]he 'bail bond is a contract between the surety and the government whereby the surety acts as a guarantor of the defendant's appearance in court under the risk of forfeiture of the bond.' (*People v. Ranger Ins. Co.* (1994) 31 Cal.App.4th 13, 22.) Thus, when there is a breach of this contract, the bond should be enforced. (See *People v. North Beach Bonding Co.* (1974) 36 Cal.App.3d 663, 675.)" (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 657-658.)

"Section 1305, subdivision (a) requires the trial court to declare a forfeiture of bail when a defendant fails to appear in court without a satisfactory excuse. The clerk of the court is required to mail notice of the forfeiture to the bail agent within 30 days of the forfeiture. (§ 1305, subd. (b).)" (*People v. Granite State Ins. Co.* (2003) 114 Cal.App.4th 758, 762.) Once a notice of forfeiture is mailed, the surety has 180 days (plus five days for mailing of the notice) to move to vacate the forfeiture and exonerate the bond on the ground the defendant has voluntarily appeared or is in custody following his or her arrest. (§ 1305, subds. (b), (c)(1).)

Within the 185-day period, section 1305.4 allows the surety to file a motion, based on good cause, for an order extending the 185-day period, "not exceeding 180 days from its order." Section 1305, subdivision (j) provides "a motion filed in a timely manner

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[1] All further statutory references are to this code.

within the 180-day period may be heard within 30 days of the expiration of the 30 day requirement." (§ 1305, subd. (j).)

## STANDARD OF REVIEW

A trial court's ruling on a motion for extension under section 1305.4 is reviewed for abuse of discretion. (*County of Los Angeles v. Fairmont Specialty Group* (2008) 164 Cal.App.4th 1018, 1028; *People v. Ranger Ins. Co.* (2007) 150 Cal.App.4th 638, 644.) The trial court is said to have abused its discretion when its decision exceeds the bounds of reason, all circumstances being considered. (*People v. Seneca Ins. Co.* (2004) 16 Cal.App.4th 75, 80.) A trial court's ruling based on its interpretation of a statute on uncontested facts is a question of a law subject to de novo review. (*County of Los Angeles v. Fairmont Specialty Group* (2009) 173 Cal.App.4th 146, 151.)

## FACTUAL AND PROCEDURAL BACKGROUND

On February 29, 2012, Surety posted a bail bond in the amount of $1,240,000 for the release of defendant Oscar Grijalva (Grijalva) in his prosecution for attempted murder and related charges. On August 23, 2012, Grijalva failed to appear in court. The court declared his bail forfeited and issued a bench warrant. A notice of forfeiture was mailed the next day, on August 24, 2012. The 185th day after that mailing was February 25, 2013.

On February 20, 2013, Surety filed its first motion to extend the exoneration period pursuant to section 1305.4. The motion was heard on March 20, 2013. The court granted the motion and ordered the period extended 134 days to August 1, 2013. A second motion to further extend the exoneration period, or in the alternative to toll the running of that period, was filed on August 1, 2013 (23 days before the one-year anniversary of the forfeiture notice mailing), and was heard on August 26, 2013 (the same day the one-year period lapsed). The motion was denied.

Attached to the motion was Surety's investigator, Cesar McGuire's, declaration of the action he had taken to apprehend Grijalva. In sum, the declaration revealed the following efforts between February 19 and July 31, 2013: McGuire contacted Grijalva's relatives on multiple occasions between March and July 2013 to learn of his whereabouts; offered to pay a $100,000 reward to Grijalva's sister if she persuaded Grijalva to turn himself in; raised the reward from $100,000 to $200,000, and posted the updated information on websites and publicized the information in California and Mexico; conducted surveillance at addresses in Taft, Bakersfield, Sylmar, and Arleta, California and interviewed neighbors and local businesses to gather information on Grijalva; followed Grijalva's mother and sister to Rosarito, Baja California, and inquired at the hotel at which they were staying if Grijalva looked familiar; contacted law enforcement in Rosarito; and ran want ads on Facebook throughout Tijuana, Rosarito, Ensenada and Baja California. Unfortunately, none of this resulted in a confirmed sighting of Grijalva, or a verified location.

In June 2013, McGuire learned through a Facebook message that the Harpy gang had a clique close to the Mexican border at Tijuana. Because he had earlier received information that Grijalva may have been a member of this gang, McGuire went to Tijuana and spoke with local law enforcement regarding the Harpy gang. The Tijuana authorities confirmed the presence of the Harpy gang and agreed to contact McGuire if they sighted Grijalva. Again this proved fruitless. It produced no sightings, or additional information.

On July 22, 2013, McGuire received a call from an informant claiming to have information about Grijalva's whereabouts. McGuire met with the informant on July 24, 2013, and was told he knew Grijalva's family personally; Grijalva was "in Tijuana" but it might take "some time to get actual detailed information" because he didn't want it to be "obvious he was gathering information." McGuire's declaration is devoid of a factual foundation for the informant's claimed knowledge Grijalva was in Tijuana.

On July 26, 2013, an unnamed U.S. law enforcement officer who stated that he handles all fugitives outside the U.S. advised McGuire that unnamed law enforcement officials in Mexico claimed they had an informant who knew Grijalva. Again nothing, no sightings or confirmed locations were produced from this 11th hour, third hand information.

During the August 26, 2013, hearing the trial court denied the second motion for an extension, finding a lack of good cause as reflected in the following colloquy:

"[Counsel]: So the court has jurisdiction to grant 180 day extension from the [March] 20th date, which is September 16th, which is a Monday; and I know the court has been operating under the understanding that it can only grant an extension for 365 days total, but that's not what the statute and case law states. It allows the court to grant an extension from a full 180 [days] from the date of the order."

"The Court: That's discretionary. I'll deny that request. There is no good cause –

"[Counsel: The good cause is based on the diligence and likelihood of success, which the declarations amply show that's a very low threshold; and the court's have held it's abuse of discretion to deny an extension with far less details and less success than in this case. I would ask the court to grant the extension to the time period of 9/16. This defendant is very close to being able to be returned to the court.

"The Court: There is no declaration. There is nothing –

"Counsel: There is a declaration.

"The Court: There is no declaration that supports that. They think he's somewhere in Tijuana.

"Counsel: Working with the marshals, who have been identified with the defendant.

"The Court: Sir, I'll deny your request. Bail remains forfeited."

In sum, in denying the motion, although the Surety had made considerable efforts to locate Grijalva, the trial court did not find based on the information provided there was a reasonable likelihood Grijalva would be apprehended if an extension were granted. "They think he's somewhere in Tijuana" was not enough.

Surety timely filed a notice of appeal.

## DISCUSSION

### 1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING SURETY FAILED TO SHOW GOOD CAUSE TO EXTEND THE APPEARANCE PERIOD A SECOND TIME AFTER PREVIOUSLY RECEIVING A 134-DAY EXTENSION.

At any time within the 185-day period – referred to as the "appearance" or "exoneration" period – the surety may seek an order extending the period. "A further extension is not automatic. [A surety] has to earn additional time by showing good cause." (*People v. Ranger, supra,* 81 Cal.App.4th at p. 681.) "The court may, if good cause is shown for doing so, order the period extended 'to a time not exceeding 180 days from its order.' (§ 1305.4; see § 1305, subd. (i).) Where several shorter extensions are granted, the courts have held that section 1305.4 allows 'an extension of no more than 180 days past the 180th day [effectively the 185-day] period set forth in section 1305." (*People v. Taylor Billingslea Bail Bonds* (1999) 74 Cal.App.4th 1193, 1199, 88 Cal.Rptr.2d 713; (*Taylor Billingslea* ); see also *People v. Granite State Ins. Co.* (2003) 114 Cal.App.4th 758, 768, 7 Cal.Rptr.3d 887 (*Granite State* ) ['[w]e agree . . . that the exoneration period can only be extended an additional 180 days once'].) Once the appearance period has elapsed without the forfeiture having been set aside, the court 'shall enter a summary judgment against each bondsman named in the bond' in the amount of the bond plus costs. (§ 1306, subd. (a).)" (*People v. Bankers Ins. Co.* (2010) 182 Cal.App.4th 1377, 1380.)

"Given the underlying policy of avoiding forfeitures in favor of bringing defendants before the court, a trial court, faced with a section 1305.4 motion for extension, should draw all inferences in favor of the surety. [Citation.] The good cause showing under section 1305.4 is a low threshold for the movant. If the surety demonstrates good cause by showing due diligence . . . , a reasonable likelihood of success of capturing the defendant in a subsequent [extension period], and any other relevant circumstances, the court should grant the motion." (*People v. Accredited Surety & Casualty Co., Inc.* (2006) 137 Cal.App.4th 1349, 1358 (*Accredited*).)

To constitute "good cause" both due diligence and a reasonable likelihood of recapture must be shown. (*County of Los Angeles v. Fairmont Specialty Group* (2008) 164 Cal.App.4th at pp. 1028-1029 (*Fairmont*); *Accredited, supra,* 137 Cal.App.4th at p. 1357.) Both are equally important circumstances in determining "good cause." (*Accredited, supra,* at p. 1358.)

Surety argues the showing of "diligent, consistent and reasonable efforts to locate a fugitive is the measure of good cause." Surety is wrong; more is required.

There are only four published cases interpreting the good cause requirement of section 1305.4: *Fairmont, supra,* 164 Cal.App.4th 1018; *People v. Ranger Ins. Co.* (2000) 81 Cal.App.4th 676 (*Ranger*), *People v. Alistar Ins. Co.* (2003) 115 Cal.App.4th 122 (*Alistar*), and *Accredited, supra,* 137 Cal.App.4th 1349. Each case considered the likelihood of recapture as part of the circumstances demonstrating good cause, although *Accredited* (*supra,* at p. 1349) and *Fairmont* (*supra,* at p. 1022) were the only cases to do so explicitly.

In *Fairmont, supra,* 164 Cal.App.4th 1018, a case factually similar to ours, our colleagues in Division Seven found the facts presented by the surety insufficient to establish good cause to grant an extension. There the investigator's declaration indicated the pre-investigation unit of Bad Boys Bail Bonds had contacted courts, jails, the defendant's family members, friends, employers and other secondary leads. Those efforts had proved fruitless, and the defendant's case was sent to the skip trace department for

research. The investigator had reviewed the file, obtained the defendant's booking photograph and checked the defendant's bench warrant status with the court. He checked daily through various law enforcement websites to see whether the defendant was in custody. He also explained he had telephoned the indemnitor, Juan Carlos Zurita, and left a message. Later, he went to Zurita's home and spoke to him directly. Zurita said he believed the defendant was in Mexico, and promised to call the defendant's wife to get more information. (*Id.*, at p. 1022.)

One week later, Zurita called and told the investigator that the defendant's wife had confirmed the defendant was in Mexico. Zurita told the investigator he would call him later with the defendant's telephone number in Mexico, which he failed to do. Thereafter, the investigator conducted periodic surveillance at various local addresses: the defendant's home address when arrested; an alternative home address for the defendant, which had since been torn down; and a residence address for the defendant's son, at which other persons were living. No one at any of these locations had sighted the defendant or knew his current contact information. Three months later, the investigator telephoned Zurita. Zurita advised him the defendant was still living in Mexico. Zurita said another friend, Martin Sanchez, had talked to the defendant in Mexico and the defendant told Sanchez he was planning to return to the United States to resolve the case. The investigator declared that with Sanchez's assistance, Zurita was either going to learn the defendant's location in Mexico or find out when the defendant planned to return to this country. The investigator concluded his declaration with his "opinion, that if granted additional time, in light of the new information obtained, and with the assistance of [Zurita] and the informant, the defendant will be apprehended and surrendered to the court." (*Fairmont, supra*, 164 Cal.App.4th at pp. 1022-1023.)

At the hearing on Fairmont's motion to extend time, the prosecutor did not oppose Fairmont's request because he did not consider it "that unreasonable." (*Fairmont, supra,* at p. 1023.) The court nevertheless denied the motion, explaining, based on "what's been provided the court, I don't really believe an extension of time will necessarily assist bails

[sic] bonds in finding [the defendant]. Even based on the bails [sic] bonds' declaration, it appears that [the defendant] is in Mexico, avoiding this case, knowing that there's a warrant out for his arrest." The trial court entered summary judgment against Fairmont which was affirmed on appeal. (*Fairmont, supra*, 164 Cal.App.4th at p. 1023.)

In *Ranger, supra,* 81 Cal.App.4th 676, the investigator's declaration indicated he had located a positive address for the defendant in Rosarito, Mexico, and that the defendant was a member of a band. The declaration contained no explanation of how the investigator learned or verified this information. Because of the paucity of information, the appellate court found the surety had not demonstrated good cause to have the time extended. The court held a showing of good cause "means an explanation of what efforts [the surety] made to locate [the defendant] during the initial 180 days, and why such efforts were unsuccessful." However, in reaching this determination, the court also considered the fact that the statement did not indicate how the investigator had located defendant, how he knew he had a bona fide address or the significance of defendant's membership in a band. Without these facts, the court could draw no reasonable inference about the likelihood of recapturing defendant. Thus, in considering the lack of these facts, the court concluded there was an absence of good cause. (*Id.* at pp. 678-682.)

In *Alistar, supra,* 115 Cal.App.4th 122, the investigator had found a new address for the defendant and obtained the help of local police. The conduct of the defendant's family members indicated he was in the area and that they were in contact with him. The investigator had a confirmed address for the defendant's sister. The defendant's brother called him and offered to pay the bond. The appellate court considered the fact that the agent had cooperation from the family and good reason to believe the defendant was currently in a particular geographic area. These facts allowed the court to draw the reasonable inference that, with an extension of time, the defendant was likely to be recaptured. (*Id.* at pp. 128-129.)

In *Accredited, supra,* 137 Cal.App.4th 1349, the Court of Appeal found an abuse of discretion in the denial of the surety's section 1305.4 motion because the investigator

knew where the defendant resided at various times, with whom he associated, and what actions he had taken. He learned when the defendant fled to Illinois and was able to confirm that information. He learned when the defendant returned to Sacramento. He discovered the identities of people who were helping the defendant and where they lived. He had a long-term relationship with both defendant and his family. The defendant's family was actively cooperating with the investigator to bring the defendant to court. The appellate court found the surety had demonstrated good cause because the declaration provided facts from which a court could reasonably infer that an extension of time would serve the purpose of returning the defendant to court. (*Id.* at pp. 1353-1354, 1359.)

By contrast, in this case the bail agent had been consistently unable to gather verifiable information about Grijalva or his whereabouts. Much of the information he obtained was false or proved fruitless. Despite his conversations with some members of Grijalva's family, it appears none were cooperating or had the slightest idea where Grijalva was, where he was likely to be or with whom. Not only had Grijalva's trail grown cold, it was nonexistent.

In both *Alistar, supra,* 115 Cal.App.4th 122 and *Accredited, supra,* 137 Cal.App.4th 1349 the investigator or bail agent was consistently able to gather information about the defendant and his whereabouts. Further, they were able to provide information that indicated they had a general idea of where the defendant might be and had prospects for obtaining additional information which would eventually lead to his recapture. The existence of this factual information gave rise to an inference there was a reasonable likelihood of capturing the defendant, and is what distinguishes those cases from the one before us. In *Accredited* and *Alistar,* there were verifiable facts from which reasonable inferences about the likelihood of capture could be drawn. In this case there are no such facts.

A showing of a reasonable likelihood of recapture is an important circumstance to be considered in determining good cause for an extension. Although the good cause

showing under section 1305.4 is low, it is not non-existent. (*Accredited, supra,* 137 Cal.App.4th at p. 1358.) Simply, it was not met in this case.

We strictly construe the relevant statutory provisions in favor of the surety, but it is the surety who bears the burden of establishing that it falls within the statutory requirements for relief. (*People v. Ranger, supra,* 139 Cal.App.4th at p. 1564.) As Surety failed to carry its burden, the trial court did not abuse its discretion in denying the second motion to extend the appearance period.

Surety's central argument in its brief on appeal is that the trial court erred in denying the requested relief based on its mistaken belief it lacked discretionary authority to further extend the extension period: "The trial court here did not fault the surety for the efforts made to locate the defendant. Rather, it was under the erroneous impression that the 'year has run out.'" Surety then argues that, at the time the court ordered the initial extension of the appearance period on March 20, 2013, it was authorized to extend the period until September 16, 2013, that is, 180 days from the date of its prior order. Thus, in its second extension request, Surety sought to obtain the additional 46 days which it claims the court was authorized to grant on March 20, but did not.

As explained above, we find abundant evidence in the record that the trial court denied the second extension motion based on its conclusion that Surety had failed to establish a reasonable likelihood an additional 46-day extension would result in the return of Grijalva to the court's custody.

We have serious doubt Surety was entitled to an additional 46 days based on relevant case law. In *Taylor Billingslea, supra,* 74 Cal.App.4th 1193 the trial court had previously granted several extensions of the appearance period. On the day before the one-year anniversary of the mailing of the notice of bond forfeiture, the trial court denied the surety's request for an additional seven-day extension, stating there was "no authority in either case law or the statute that would permit me to extend the tolling period for more th[a]n 180 days." (*Id.* at p. 1197.) Division Four of this Court affirmed that ruling. After granting that "[t]he language in section 1305.4 is somewhat ambiguous," the

appellate court reviewed the legislative history of the statute. It concluded, "Guided by the language of the statute and the explanation of its provisions provided by the legislative counsel, we are of the opinion that the Legislature intended section 1305.4 to allow an extension of no more than 180 days past the 180-day [now 185-day] period set forth in section 1305." (*Id.* at p. 1199.) Subsequent cases have cited *Taylor Billingslea* in support of the proposition that the maximum period during which a surety may vacate the forfeiture is 365 days from the date of mailing of the notice of forfeiture. (See, for example, *People v. Granite State Ins. Co., supra,* 114 Cal.App.4th at p. 768 ["We agree . . . that the exoneration period can only be extended an additional 180 days once."]; *People v. Bankers Ins. Co., supra,* 182 Cal.App.4th at p. 1382 ["[T]he statute allows an extension of the appearance period 'of no more than 180 days' past the 185-day period provided by section 1305"]; *People v. Accredited Surety and Casualty Co., Inc.* (2013) 220 Cal.App.4th 1137.)

In the last cited case, *People v. Accredited Surety and Casualty Co., Inc., supra,* 220 Cal.App.4th 1137, a notice of bail forfeiture was mailed to the surety on January 18, 2011. On July 22, 2011, 185 days later, the surety filed a motion to extend the appearance period pursuant to section 1305.4, which motion was set for hearing on August 5, 2011. The People conceded that the extension request was supported by good cause, and "'suggested that the statutory deadline should be extended in this matter for 180 days from the date of the order purporting to extend the deadline to January 31, 2012.'" (*Id.* at p. 1141.)

On April 26, 2012, summary judgment was entered on the forfeiture. Contending that the extended exoneration period authorized by statute expired no later than January 18, 2012 (365 days after service the notice of forfeiture), the surety challenged the validity of the summary judgment, claiming that it was entered beyond the 90-day period authorized by section 1306, subdivision (c)[2] and was therefore void. In response,

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[2] Section 1306, subdivision (a) provides that when the exoneration period has lapsed without the forfeiture being set aside, the trial court shall enter summary judgment in the

the People maintained that the trial court's extension of the appearance period to January 31, 2012 was proper as that date was within 180 days of the court's August 5, 2011 extension order. Citing *Taylor Billingslea, supra,* 74 Cal.App.4th 1193, *People v. Granite, supra,* 114 Cal.App.4th 758 and *People v. Bankers Inc. Co., supra,* 182 Cal.App.4th 1377, the Court of Appeal rejected this analysis: "All of the cases that have addressed the ambiguity in section 1305.4 have concluded that this is not a correct reading of the statute." (*Id.* at p. 1147.) Consequently, the court concluded that, "[u]nder the construction of section 1305.4 adopted by every court that has thus far considered the question, the summary judgment in the present case was entered after the expiration of the 90-day time period permitted by section 1305, subdivision (c)." (*People v. Accredited Surety and Casualty Co., Inc., supra,* 220 Cal.App.4th at p. 1149.) Thus, this case holds that the 180-day extension authorized by section 1305.4 is to be measured from the date the exoneration period would have expired in the absence of an extension, rather than from the date the court granted the extension; or in other words, 365 days from the mailing of the notice of forfeiture.

Without explicitly repudiating this holding, our colleagues in Division Four recently came to the opposite conclusion in *County of Los Angeles v. Williamsburg* (2015) 235 Cal.App.4th 944 ("*Williamsburg*"). In that case, a notice of bail forfeiture was mailed to the surety on July 23, 2012, giving the surety until January 24, 2013 to produce the defendant. On January 22, 2013, the surety moved to extend the appearance period pursuant to section 1305.4; the motion was heard on February 1, 2013, and the appearance period was extended to July 20, 2013. The surety filed a second motion to extend the appearance period on July 22, 2013 (the first court day after July 20, 2013), with hearing set for August 11, 2013. The trial court denied the motion without a hearing on July 22, 2013. While the issue on appeal was simply whether the surety had a statutory right to a hearing on its extension motion, the court explained in a footnote in

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amount of the bond, plus costs. Subdivision (c) of that section provides that in the event "summary judgment is not entered within 90 days after the date upon which it may first be entered, the right to do so expires and the bail is exonerated."

dicta that the "plain text" of section 1305.4 "clearly states that any extension runs from the date the court issues an order granting an extension." In reaching this conclusion the court cited a nine-word paraphrase contained in *People v. American Contractors Indemnity Co.*, *supra*, 33 Cal.4th 653, 658 (*American Contractors*), "'[T]he trial court may . . . extend the period by no more than 180 days *from the date the trial court orders the extension*, provided that the surety files its motion before the original 185-day appearance period expires and demonstrates good cause for the extension. [Citations.]' Emphasis added.)" (*Williamsburg, supra,* at p. 951, fn. 7, underscore added.) As our discussion makes clear, we disagree with the dicta of the *Williamsburg* court.

*American Contractors, supra,* 33 Cal.4th at pp. 662-663, held the premature entry of summary judgment following a bail forfeiture renders the judgment voidable, not void. In dicta, in the introduction to the opinion, the Supreme Court described in general terms the process by which a surety may extend the appearance period: "[T]he trial court may . . . extend the period by no more than 180 days from the date the trial court orders *the extension* . . . ." (*Id.,* at p. 658, emphasis added.) Section 1305.4 actually states the court may order the appearance period "extended to a time not exceeding 180 days *from its order*" (emphasis added.) The gravamen of the Supreme Court holding, premature entry of summary judgment renders the judgment voidable, not void, did not require an analysis of the meaning of the phrase "from its order" in section 1305.4. Therefore the opinion is devoid of any analysis of whether "from its order" means 180 days from the last day of the appearance period, or 180 days from the date of a subsequent order extending the appearance period.

2. THE TOLLING PROVISION OF SECTION 1305, SUBDIVISION (H) DOES NOT APPLY TO THE FACTS OF THIS CASE.

Surety also contends that it was entitled to a tolling of the appearance period under section 1305, subdivision (h). We do not agree.

Subdivision (g) of section 1305 states: "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." (§ 1305, subd. (g).) Subdivision (h) of the statute provides: "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." (§ 1305, subd. (h).)

"The geographic scope of section 1305, subdivision (g) is set forth in simple language: It applies when a defendant is detained by bail agents 'beyond the jurisdiction of the state.' Plainly, this includes situations in which the defendant is located in another country." (*County of Orange v. Ranger Ins. Co.* (1998) 61 Cal.App.4th 795, 800.) Thus, in order to benefit from the tolling provision of the statute, Grijalva must have been temporarily detained by the bail agent and have been identified by a law enforcement officer in the foreign jurisdiction. Neither of these predicates were present at the hearing on Surety's extension request: The investigator's declaration made clear that Grijalva had never been located, much less detained and identified by a local law enforcement officer. Relief under subdivision (g), and consequently under subdivision (h), is simply not available when the accused was never temporarily detained by the bail agent in the presence of a local law enforcement officer, or positively identified by that law

enforcement officer. (*People v. Accredited Surety & Casualty Co.* (2004) 132 Cal.App.4th 1134, 1146.)

Moreover, tolling can be granted only with the agreement of the prosecutor. While Surety represents that "the prosecuting agency was very interested in having the defendant returned to court, and the extradition deputy was inclined to agree to a tolling," at the extension hearing, it conceded, "I agree that at this moment [the prosecutors] haven't made an agreement to do that." Consequently, as the trial court ruled, the tolling provision of section 1305, subdivision (h) was unavailable in this case.

For the foregoing reasons, we conclude that Surety has failed to establish that the trial court erred in denying its motion to extend the appearance period. Accordingly, we affirm.

DISPOSITION

The order is affirmed. The County of Los Angeles is awarded costs of appeal.

**CERTIFIED FOR PUBLICATION**

KIRSCHNER, J.*

We concur:

MOSK, Acting P.J.

KRIEGLER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. _____

**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 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/ Jared Rorabaugh
Jared Rorabaugh