IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S229446

THE PEOPLE,
Plaintiff and Respondent,

v.

FINANCIAL CASUALTY & SURETY, INC.,
Defendant and Appellant.

Court of Appeal
Second District, Division Five
No. B251230

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

REPLY BRIEF ON THE MERITS

John M. Rorabaugh (SBN # 178366)
Robert Tomlin White (SBN # 222504)

Law Office of John Rorabaugh
801 Parkcenter Dr Ste 205
Santa Ana, CA 92705
(714) 617-9600
fax: (714) 644-9986
baillaw@usa.net

Attorney for Defendant and Appellant

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REPLY BRIEF ON THE MERITS

INTRODUCTION

California Penal Code section 1305.4 requires that a bail bond surety demonstrate "good cause" in order to receive an extension of its statutory 180-day deadline to surrender a bail fugitive in exoneration of a bail bond pursuant to Penal Code section 1305.[1] In enacting Penal Code section 1305.4 the California Legislature stated its intentions, "[t]he purpose of this bill is to allow bail forfeiture to be stayed beyond the current statutory limitation for good cause" by providing an extension of the appearance period. (Cal. Bill Analysis, Senate Committee, Sen. Bill 1571 (1995–1996 Reg. Sess.) July 8, 1996.) Pursuant to the specific language of the statute, as well as the record of its legislative history, the basis upon which a motion made pursuant to Penal Code section 1305.4 must be adjudged is a showing of "good cause."

As set forth in Financial Casualty & Surety, Inc.'s (the "Surety") Opening Brief on the Merits (Surety's "OBM"), although "good cause" is generally defined as a "legally sufficient reason," appellate courts have subsequently twisted the "good cause" provision of Penal Code section 1305.4 into a standard requiring a judicial forecast of how successful a bail fugitive investigation might be, i.e. the bail fugitive's "likelihood of apprehension," in order to grant a motion to extend the appearance period. As

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[1] For clarity and consistency, the initial "180-day" period set forth in California Penal Code section 1305 and any extension of this 180-day period will be referred to as the "appearance period."

demonstrated by one of the cases on review here, *People v. Accredited Cas. Sur.* (2015) 239 Cal.App.4th 293 *(Accredited 2015)*, requiring trial court Judges (presumably untrained in bail fugitive investigations) to predict whether or not an investigation will culminate in the capture of a bail fugitive has resulted in rulings that do *not* find "a likelihood of apprehension" and impose bail forfeiture, even when the fugitive was subsequently apprehended as a result of a surety's investigation. Even worse, as occurred in this case below, a "likelihood" standard has had the effect of halting diligent and thorough bail fugitive investigations when it was statutorily possible to extend such investigations and forfeiture could have been "stayed beyond the initial statutory limitation." Further, published studies cited in the Surety's OBM demonstrate that regardless of the speculated outcome of a fugitive investigation, surety bail investigations have been statistically demonstrated to be the most effective means to secure the return of absconding defendants. Thus, halting diligent bail fugitive investigations that could have instead been statutorily extended, does a disservice to the public which is incurred for no legitimate reason.

Nonetheless, the Office of the County Counsel, County of Los Angeles (the "People") has responded to the Surety's OBM by inserting customized language into the legislative history of Penal Code section 1305.4 to support their argument that somehow the Legislature meant to require a trial court foresee the result of a surety's investigation before granting a diligent surety more time to investigate the whereabouts of a bail fugitive. However, the language the People would prefer to be present in the statute and the legislative record is simply not

there. Moreover, the People completely ignore the public policy implications of halting diligent searches for bail fugitives, which the People dismiss as "irrelevant." The undeniable purpose of Penal Code section 1305.4 is to provide sureties with the ability to secure additional time to continue expending resources to apprehend bail fugitives when "good cause" has been demonstrated. Furthermore, the overall objective of the bail bond system is to compel the *return of bail fugitives, not to impose forfeiture*. When interpreting Penal Code section 1305.4's "good cause" provision, it is not only *relevant* for a reviewing court to consider the overall objectives of the law, as well as the public's interest, such consideration follows well established precedent.

In addition, the plain and unambiguous language of Penal Code section 1305.4 asserts that a trial court can grant a 180 day extension of the appearance period up to "180 days from its order." (Pen. Code, § 1305.4) Likewise, Penal Code section 1305, subdivision (j), explicitly states that "a motion filed within a timely manner within the 180-day period may be heard within 30 days of the expiration of the 180-day period" and the 30-day calendaring period for the motion may itself be extended, upon a showing of "good cause." (*Ibid.*) Penal Code section 1305.4 also specifically refers to Penal Code section 1305, subdivision (j), as the procedural provision governing the filing and calendaring of motions made pursuant to Penal Code section 1305.4. Moreover, the legislative history of Penal Code sections 1305.4 and 1305, subdivision (j), consistently state that an "order" granting an extension of the appearance period be made "*after a hearing*" – which pursuant to Penal Code section 1305, subdivision (j) (as

well as its former versions, subdivisions (i) and (c)(4)), can be held 30 days, or more, after the expiration of the initial appearance period.

Despite the specific language of Penal Code sections 1305.4 and 1305, subdivision (j) (and former subdivisions (i) and (c)(4)), the People ask this Court to (mis)interpret these statutes at a fixed moment in time twenty years ago, while turning a blind eye to a subsequent statutory amendment that explicitly invalidates such an interpretation. Conspicuously, in their Answer Brief on the Merits ("ABM"), the People do not provide any real analysis of how their highly selective statutory interpretation promotes the return of bail fugitives, advances the goals of the bail bond system, or benefits the public.

In considering the "good cause" provision of Penal Code section 1305.4, as well as the calculation of an extended appearance period pursuant to Penal Code section 1305.4, the Surety respectfully requests this Court simply follow the original intent of the Legislature and the plain language of the statutes themselves to allow a trial court to extend the appearance period for up to 180 days from "*its order*" upon a showing of "*good cause*." Such analysis will yield a result that will also be in accordance with the well-established principles that the purpose of bail is to ensure the presence of the accused, that forfeitures are to be abhorred, and in recognition that the most beneficial service a bail surety provides to the public is its willingness to search for a bail fugitive for as far, and as long, as permitted by law. Unless a surety is being negligent in its duties to search for a bail fugitive, there is simply no compelling reason to halt a diligent investigation that can otherwise be statutorily extended.

Instead, the law should encourage sureties to *diligently* search for a fugitive for the maximum amount of time that is statutorily possible.

ARGUMENT

I. "GOOD CAUSE" UNDER PENAL CODE SECTION 1305.4 SHOULD NOT REQUIRE PREDICTING THE OUTCOME OF A BAIL FUGITIVE INVESTIGATION IN ORDER FOR A SURETY TO RECEIVE AN EXTENSION OF THE APPEARANCE PERIOD.

In its ABM, the People argue that this Court should adopt the judicially created, and increasingly decisive, "likelihood of apprehension" interpretation of the "good cause" provision of Penal Code section 1305.4. In support of its argument that a prediction of future success should be required in order to establish "good cause," the People argue that halting demonstrably diligent bail fugitive investigations and *imposing forfeiture*, is somehow "consistent" with the long established policy of *avoiding forfeiture*. (ABM 15.) However, affirming a speculative restriction on the extension of diligent bail fugitive investigations, which results in the cessation of an investigation and the imposition of forfeiture, is in reality, "consistent" with generating *more forfeiture*. On the other hand, extending diligent bail fugitive investigations *is* consistent with returning more bail fugitives to court. Additionally, the legislative history, purpose and language of Penal Code section 1305.4 are clear – the statute was unquestionably enacted, and amended, to provide bail sureties with more time to continue bail fugitive investigations.

The People's strained interpretation of Penal Code section 1305.4's language and the legislative intent behind the statute is simply inaccurate and cannot be supported.

A. The Legislative History And Text Of Penal Code Section 1305.4 Do Not Support Denying Motions To Extend The Appearance Period For Failure To Establish The "Likelihood" Of A Bail Fugitive's Apprehension.

In this case below, as well as in *Accredited 2015*, the trial courts denied motions to extend the appearance period on the *sole basis* that the respective sureties did not show a "likelihood" of apprehending the respective bail fugitives (notwithstanding the fact that the surety in *Accredited 2015* subsequently did in fact apprehend the fugitive). The People argue for affirmation of these decisions claiming that support for a "likelihood of apprehension" standard can be found in the "statutory construction" and "legislative intent" of Penal Code section 1305.4. (ABM 10–15). However, the People's interpretation of Penal Code section 1305.4 and its history is not only erroneous, but ignores the true purpose behind the enactment of the statute.

Penal Code section 1305.4 was specifically enacted to provide courts with statutory authority to grant sureties *more time* to search for bail fugitives. In order to obtain this additional time, sureties must (and can only) attest to the diligent efforts they are making in their investigation. Consistent throughout the legislative record of Penal Code section 1305.4 is the foundation that the law's purpose is to extend the appearance period upon a

showing of "good cause." The legislative history and the statute itself explain that "good cause" is established by "a declaration or affidavit stating the reasons showing good cause."

> This bill authorizes the surety or depositor to file a motion, based upon good cause, for an order extending the 180-day period. The motion would include a declaration or affidavit stating the reasons showing good cause to extend the period. The motion would have to be served on the prosecuting agency at least 10 days prior to the hearing. At the hearing, upon a showing of good cause, the court could order the period extended up to 180 additional days.

(Legis. Counsel's Dig., Senate Bill No. 1571 (1995–1996 Reg. Sess.) Stats. 1996, ch. 354 § 1. See also OBM 27–28.)

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> Notwithstanding Section 1305, the surety insurer, the bail agent, the surety, or the depositor may file a motion, based upon good cause, for an order extending the 180-day period provided in that section. The motion shall include a declaration or affidavit that states the reasons showing good cause to extend that period. 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.

(Pen. Code, § 1305.4.)

An affidavit is generally described as "[a] voluntary declaration of *facts* written down and sworn to by the declarant..." and a "declaration" is best defined in this context as

"a formal written statement – resembling an affidavit that attests under penalty of perjury, to *facts known* by the declarant." (*Black's Law Dict.* (Pocket ed. 1996) p. 21, col. 2; *Id. at p. 170* col. 2; (emphasis added).) Accordingly, the Legislature and the statute specifically require a surety to present *facts* that occurred in an investigation, not a guestimate of the investigation's potential success.

Undeterred by the actual language of Penal Code section 1305.4, the People argue that "support" for a "likelihood" requirement is found somewhere in the "legislative intent" of Penal Code section 1305.4. (ABM 10–15.) A "likelihood" is defined as The Merriam Webster Dictionary as "PROBABILITY." (*Merriam-Webster Dictionary* (First ed. 2016) p. 416, col. 2.) "Probability" is defined as "1: the quality or state of being probable; 2: something probable; 3: a measure of how often a particular event will occur if something (as tossing a coin) is done repeatedly which results in any number of possible events." (*Id.*, at 572 col. 1.) Not once in the *entire* legislative history of Penal Code section 1305.4 do the words "likelihood," or "probability" appear.

Further, when reading the People's handpicked legislative excerpt ("*the court cannot currently extend* the 180-day period before bail forfeiture is required, even when good cause for an extension can be shown") it is apparent that the Legislature's intent was to provide a bail surety with a basis to move a trial court for *more time* to investigate the whereabouts of a bail fugitive, *beyond what was then available by statute.* (Cal. Bill Analysis, Senate Committee, Sen. Bill 1571 (1995–1996 Reg. Sess.) April 9, 1996 (emphasis added). See also ABM 13–14

[People's insertions omitted].) Indeed, in order to make the substantial stretch necessary to argue that the Legislature intended to require a bail surety establish a "likelihood of apprehension," the People inserted tailored language into the their version of Penal Code section 1305.4's legislative history as follows, "[t]his bill would authorize an extension for up to an additional 180 days in such a case upon a hearing and a showing of [the surety tried hard to find the defendant, and it appears that if given more time, it will apprehend him]." (ABM 14.) However, the People's added language is created out of whole cloth.

Despite the People's revisionist history of Penal Code section 1305.4, there isn't any suggestion in the actual legislative record, or the statute itself, that a finding of "good cause" is contingent upon showing a "likelihood" or "probability" of the success of a bail fugitive investigation. In short, the language that the People would prefer to be in the statute and its legislative history supporting a "likelihood" requirement, simply does not exist.

B. "Good Cause" Should Be Construed In Accordance With The Objectives Of Penal Code Section 1305.4, The Purpose Of The Bail Bond System And In Furtherance Of Public Policy.

The determination of what an affidavit or declaration must show in order to constitute "good cause" for an extension of the appearance period should be made using well-established rules of statutory interpretation. The People correctly cite part of the authority governing statutory construction.

> A reviewing court's fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. [Citation.] This task begins by scrutinizing the actual words of the statute, giving them their usual, ordinary meaning. [Citation.] [¶] When statutory language is susceptible to more than one reasonable interpretation, it is regarded as ambiguous and courts must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences. [Citation.]

(People's ABM 11–12 citing *People v. Accredited Sur. Cas. Co.* (2014) 230 Cal.App.4th 548.)

However, the People conveniently left out the rest of this line of the precedent. As this Court has further explained:

> When the plain meaning of the statutory text is insufficient to resolve the question of its interpretation, the courts may turn to rules or maxims of construction 'which serve as aids in the sense that they express familiar insights about conventional language usage.' (*Mejia v. Read* (2003) 31 Cal.4th 657, 663, quoting 2A Singer, Statutes and Statutory Construction (6th ed. 2000) § 45:13, p. 107.) "'When the language is susceptible of more than one reasonable interpretation..., we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.'" [Citation.] (*People v. Jefferson* (1999) 21 Cal.4th 86, 94.) "Finally, the court may consider the impact of an interpretation on public policy, for '[w]here

> uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.'

(*Mejia v. Read, supra*, 31 Cal.4th at p. 663, quoting *Dyna-Med, Inc. v. Fair Emp.'t & Hous. Com.* (1987) 43 Cal.3d 1379, 1387.)

In examining the plain meaning of the term "good cause," it has been noted that, "[t]he term 'good cause' is not susceptible of precise definition. In fact, its definition varies with the context in which it is used. Very broadly, it means a legally sufficient ground or reason for a certain action." (*Zorrero v. Unemployment Ins. Appeals Bd.* (1975) 47 Cal.App.3d 434, 439.) Additionally, the court in *Cal. Portland Cement Co. v. Cal. Unemp. Ins. Appeals Bd.* (1960) 178 Cal.App.2d 263, 272–273 *(Cal. Portland)*, quoted from *Bliley Electric Co. v. Unemployment Comp. Board of Review* (Pa. Super. Ct. 1947) 158 Pa.Super. 548 [45 A.2d 898], as follows:

> Of course, 'good cause' and 'personal reasons' are flexible phrases... However, in whatever context they appear, they connote, as minimum requirements, real circumstances, substantial reasons, objective conditions, palpable forces that operate to produce correlative results, adequate excuses that will bear the test of reason, just grounds for action, and always the element of good faith.... When related to the context of the statute, 'good cause' takes on the hue of its surroundings, and it... must be construed in the light reflected by its text and objectives.

(*Cal. Portland, supra*, 178 Cal.App.2d at p. 273.)

In this case, the surrounding hue of Penal Code section 1305.4 is the legislative intent to provide statutory authority to extend bail fugitive investigations, which benefit the public by providing

the most effective means of assisting law enforcement in tracking down fugitives and returning them to court. The objectives of Penal Code sections 1305 and 1305.4 are to incentivize bail sureties to conduct lengthy and diligent searches for bail fugitives globally. Moreover, the affidavit (or declaration) that a bail fugitive investigator is required to submit for a "good cause" evaluation can only attest to the efforts that the investigator has made in the investigation up to that point. Determining whether the investigator's affidavit establishes "good cause" to extend a fugitive investigation should, therefore, turn upon the real circumstances, substantial reasons, objective conditions, and good faith exhibited by an investigator's affidavit. (*Cal. Portland*, *supra*, 178 Cal.App.2d at pp. 272–273.) If it is evident that, based on these factors, a surety is diligently searching for a bail fugitive, then "good cause" has been established. Upon a showing of "good cause," the express purpose of Penal Code section 1305.4 is "to allow such an investigation *to be extended.*" (Cal. Bill Analysis, Senate Committee, Sen. Bill 1571 (1995–1996 Reg. Sess.) July 8, 1996.)

Additionally, this Court should look to "a variety of extrinsic aids, including public policy," as well as "the consequences that will flow from a particular interpretation on public policy," when considering how to construe the "good cause" provision of Penal Code section 1305.4. As originally pointed out in the Surety's OBM, studies have shown that absconding defendants released on surety bond are 53% less likely to remain at large for extended periods of time compared to other forms of pre-trial release – and surety bonds result in the highest rate of recapture of any form of pre-trial release, as high as 87% or more of all defendants that

jump bail. (Helland and Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping* (2004) 47 J.L. & Econ. 93 at 188; Chamberlin, *Bounty Hunters: Can the Criminal Justice System Live Without Them?* (1998) 1998 I. Ill. L Rev. 1175; Cohen, Reaves, *Pretrial Release of Felony Defendants in State Courts* (Nov. 2007), available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=834 [as of November 28, 2015].) Instead of confronting the findings of these studies, which provide a quantifiable and statistically measured "likelihood of apprehension" for bail fugitives, the People simply dismiss this research as "not relevant" without explanation. (ABM 24–26.) For the People to claim that it is *not relevant* to look at the available objective evidence of *actual success rates* for surety bail fugitive investigations, while simultaneously advocating that a bail surety must establish a *"likeliness" of success* in order to continue an investigation, is a quite a contradictory position for the People to take.

Furthermore, "[t]here are over two million active criminal warrants in the United States on any given day." (Bierie, D., National Public Registry of Active-Warrants: A Policy Proposal, (2015) 79-JUN Fed. Probation 27.) Law enforcement agencies are forced to invest significant resources into pursuing wanted fugitives. (*Ibid.*) Accordingly, incentivizing bail sureties to search for far and wide for bail fugitives is good public policy. In addition, it has been observed that "[m]any fugitive-apprehensions derive from the assistance of other citizens," leading to an argument that making warrant information more

public would encourage private actors to assist law enforcement officers in apprehending fugitives and thus, "return substantial benefits to taxpayers." (*Id.*, at pp. 27–28.)

It has also been recognized by both California courts and the California Legislature that incentivizing bail sureties to search for far and wide for bail fugitives is good public policy. "Hunting for defendants who have jumped bail is a time-consuming and often dangerous job.... There 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. As the Assembly Report points out, if the bonding company has no assurance that once it has located the absconding defendant its bail will be exonerated...the company has no financial incentive to undertake the search...'it is not economically feasible for him to invest the considerable funds necessary to locate these fugitives.'" (County of Los Angeles v. American Contractors Indem. Co. (2007) 152 Cal. App. 4th 661, 665–666, 669 [referring to Assembly Committee on Public Safety, Report on Senate Bill 1245 (1995–1996 Regular Session) as amended June 19, 1995, page 3].)

Public policy does not favor unnecessarily halting diligent bail fugitive investigations. Nor does public policy favor the imposition of forfeiture based on inexpert conjecture as to whether there is enough probability that a bail fugitive will be apprehended. As a result, it is not surprising that the People have chosen to ignore the detrimental effects that a "likelihood" standard has on public policy, as well as the substantive data on

measured success rates for surety bail fugitive investigations, in order to argue for a position that operates to terminate diligent bail fugitive investigations.

The People seem to think that an order extending the appearance period is a "reward" or "benefit" bestowed to a surety. (ABM 14, 23.) However, the "benefit" that a surety receives from an extension of the appearance period is the opportunity to spend more time, money and resources searching for a bail fugitive. And the costs expended in an investigation do not net any return, *unless the fugitive is found.* The People also falsely claim that the Surety is arguing for "automatic" extensions and "unlimited time." (ABM 12, but see also OBM 57.) However, the Surety is really asking for a fair reading of the true statutory language and history of Penal Code section 1305.4, as well as a construction of the "good cause" provision in light of the objectives of the statute and in accordance with sound public policy. Under such a reading the Surety strongly believes that "good cause" should be measured by the actual efforts being undertaken in a bail fugitive investigation and not a guess of the probable of the outcomes of the investigation.

Despite the People's claims to the contrary, the diligence of an investigation can be adjudged for quality as well as quantity, and a "diligence" standard would serve as a strong incentive for sureties to work hard on bail fugitive investigations. As stated by the court in *People v. Accredited Sur. & Cas. Co.* (2006) 137 Cal.App.4th 1349, 1356, "a surety cannot always know how or why a defendant avoids location and capture." However, it is *far* more "likely" that a surety continuing to diligently work on a bail

fugitive investigation is going to ultimately apprehend the fugitive, than a surety whose investigation was cut off by a trial court for failing to somehow show a "likelihood" of success.

C. The People Do Not Offer Any Compelling Reasons For Not Extending *Diligent* Bail Fugitive Investigations.

The People contend that measuring the diligence of a bail surety's investigation is not enough to satisfy the "good cause" provision of Penal Code section 1305.4. (ABM 17.) However, the People do not offer any persuasive reasoning as to why "good cause" must be more than a meaningful assessment of a surety's diligence. Instead of explaining the rationale behind discontinuing a diligent bail fugitive investigation based on a hunch that a "likelihood of apprehension" has not somehow been established, the People circularly cite to case law that indisputably created the "likelihood" requirement in the first place. (ABM 17–22).

As the Surety explained in its OBM, the "good cause" provision of Penal Code section 1305.4 has judicially morphed from an explanation of what efforts a surety made and why they were unsuccessful in *People v. Ranger* (2000) 81 Cal.App.4th 676, 681, to the rule established by the Court of Appeal in this case that a demonstration of the "likelihood" of success is *equally* important as a surety's diligence. (See OBM 28–34.) Along the way the Courts of Appeal have not explained *how* the application of a "likelihood" requirement contributes to the apprehensions of

more bail fugitives, nor *how* it comports with the intent of Penal Code section 1305.4 – only that such a standard should exist, because it should. Such reasoning should not be affirmed.

The People's only other argument as to why diligence isn't enough to establish "good cause" is that other courts have "proficiently" applied a "reasonable likelihood" standard in vastly different contexts. (ABM 22–24.) The People then go on to cite a variety of inapplicable cases and statutes. However, these cases and statutes all have articulable (and more importantly, achievable) tests as to how a "reasonable likelihood" can be demonstrated in those particular and distinguishable applications.

First the People cite to the "reasonable likelihood" that a criminal defendant must establish (that he/she will likely not receive a fair trial) in order for the defendant to obtain a change of venue. (ABM 23.) However, this standard is not based on a prediction of whether the resulting trial will be fair or unfair. Instead, this Court has established a five-factor test of contemporaneous elements that can be measured to determine whether there is a "reasonable likelihood" that a criminal defendant cannot get a fair trial in a given jurisdiction. The factors to be considered are: (1) the nature and extent of publicity covering the trial; (2) the size of the population of the county where the trial is venued; (3) the nature and gravity of the offense; (4) the status of the victim and of the accused in the county, and (5) whether political overtones are present. (*Williams v. Superior Court* (1983) 34 Cal.3d 584, 588, 593.)

Next, the People refer to the test of whether an ambiguous jury instruction was "likely" misunderstood by a jury – although

the People do not explain the actual test itself. (ABM 23.) The standard for challenging a jury instruction on a "reasonable likelihood" basis is to retroactively examine what transpired at the trial and determine whether there *was* a reasonable likelihood that a jury misunderstood an instruction using objective measures and, very explicitly, not the subjective thoughts of a juror. (*Harb v. City of Bakersfield* (2015) 233 Cal.App.4th 606 *(Harb).*) The *Harb* court ruled such an evaluation consisted of "several factors, including evidence, counsel's arguments, effect of other jury instructions, and any indication by jury itself that it was misled." (*Id.* at p. 617.) Further the *Harb* court held, "[e]vidence of jurors' internal thought processes is inadmissible to impeach a verdict. [Citations.] Only evidence as to objectively ascertainable statements, conduct, conditions, or events is admissible to impeach a verdict. [Citations.]" (*Id.* at p. 623.)

The People further point to Business and Profession Code section 6007. (ABM 23.) In the preeminent case analyzing at whether it was "reasonably likely" that an attorney would harm clients under Business and Professions Code section 6007, this Court found that, "[a]s noted previously, the referee found nine specific instances of misconduct involving eight different clients to be established by the evidence, including petitioner's own testimony," and thus, "[t]he statutory criteria were established by *convincing proof to a reasonable certainty*." (*Conway v. State Bar* (1989) 47 Cal.3d 1107, 1123–1124, 1126 *(emphasis added).*) If there is a way to prove to a reasonable certainty the outcome of a bail fugitive investigation, there can be little doubt that every bail surety would like to know what it is.

The People then cite Penal Code section 938.1, which requires a grand jury's transcripts be made public unless it is "reasonably likely" that doing so would prejudice a defendant. (ABM 23.) However, the "likelihood" standard found in Penal Code section 938.1 follows the same articulable five part test for establishing prejudice in order to change the venue of a criminal trial. "We have concluded that this is the appropriate standard of review by referring to the standard applicable to review of rulings on motions to change venue in criminal cases." (*Press-Enter. v. Superior Court* (1994) 22 Cal.App.4th 498, 503.)

Finally, the People point to the Superior Court of Los Angeles County, Local Rules, rule 7.3, permitting a court to deny media access to a juvenile in a dependency proceeding if the court finds a "reasonable likelihood" that the juvenile will be harmed. Even this local rule has a specific criteria for determining such a "likelihood." "Pertinent Factors. In making its determination, the court may consider, but is not limited to, the following factors: age of the child, nature of the allegations in the case, child's expressed desire, child's physical and emotional health, extent of the present or expected publicity and its effect, if any, on the child and his or her family." (*Id.*, rule 7.3(c)(5)(c).)

These cases and statutes are of dubious value to this matter given the divergence of issues involved. None of the cases and statutes cited by the People require a court to predict the outcome of an investigation. Moreover, in the context of bail fugitive investigations, a "likelihood of apprehension" standard is apparently whether a trial court judge, who has probably never chased a fugitive, believes that a bail surety investigator(s) will successfully catch a fleeing fugitive. Such an inarticulable

standard, which a surety can do very little to ascertain and proactively establish, should not be the reason diligent bail fugitive investigations are terminated.

Dr. Niels Bohr, a Nobel laureate physicist is often quoted as stating, "[p]rediction is very difficult, especially if it's about the future." The law should encourage bail sureties to diligently search for bail fugitives, not require a questionable assessment of the probability for success of a bail fugitive investigation. The People claim that trial courts do not have any trouble determining the "likelihood" of a bail fugitive's apprehension a based on a random, subjective and untrained analysis of an investigator's declaration. However, the trial court in the *Accredited 2015* guessed completely wrong. And in this case, the trial court's ruling effectively put an end to a highly diligent, multi-agency coordinated and international bail surety investigation for an attempted murder suspect – leaving the task of apprehending this fugitive to law enforcement along with innumerable other active warrants. Additionally, the outcome of these decisions have been the imposition of abhorred forfeiture while affirming and expanding precedent detrimental to the criminal justice system and at odds with public policy.

There is absolutely no indication that the Legislature intended for the "good cause" provision of Penal Code section 1305.4 to become an exercise in forecasting the success of a bail surety investigation. On the contrary, the clear purpose of the statute is to provide a trial court with statutory authority to allow active and diligent bail fugitive investigations to be extended and forfeiture avoided. Consequently, the People's argument that the statutory construction and legislative intent of Penal Code

section 1305.4 support a "likelihood" standard, requiring a prediction of the probable outcome of a bail surety investigation, must be rejected.

II. AN EXTENSION OF THE APPEARANCE PERIOD IS CALCULATED FROM THE DATE OF A COURT'S ORDER

Penal Code section 1305.4 clearly states that, "*upon a hearing*" for a properly filed motion and a showing of "good cause," a trial court has the authority to order the appearance period "extended to a time not exceeding 180 days *from its order*." (*Ibid.* (emphasis added).) Additionally, Penal Code section 1305.4 explicitly designates how a motion and hearing brought pursuant to Penal Code section 1305.4 may be properly filed and calendared, "[a] motion may be filed and calendared as provided in subdivision (j) of Section 1305." (*Ibid.*)

Penal Code section 1305, subdivision (j) states in pertinent part:

> (j) A *motion* filed in a timely manner within the 180-day period *may be heard within 30 days of the expiration* of the [appearance period]. The court may extend the 30-day period upon a showing of good cause.

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

Accordingly, it is not surprising that it has been widely held that timely filed motions made pursuant to Penal Code section 1305, subdivision (j) (formerly subdivisions (i) and (c)(4)), can be calendared, heard and ruled upon 30 days (or more upon a

showing of good cause) *after* the expiration of the appearance period. (See *Granite State Ins. Co.* (2003) 114 Cal.App.4th 758, *People v. Aegis* (2005) 130 Cal.App.4th 1071, *Cnty. of Los Angeles v. Williamsburg Nat. Ins. Co.* (2015) 235 Cal.App.4th 944 *(Williamsburg)*, *People v. United State Fire Ins. Co.* (2015) 242 Cal.App.4th 991 *(United States Fire).*) Further, in *Williamsburg* and *United States Fire* it was specifically (and correctly) held that pursuant to the plain language of Penal Code section 1305.4, an extension of the appearance period commences from the date that a trial court makes *its order* after a *hearing* on the matter, which can clearly occur after the expiration of the initial appearance period.

While these provisions seem straightforward, the People argue that this Court should ignore the express statutory language, as well as the true legislative intent, and rule that any and all extensions of the appearance period must be calculated retroactively from *the mailing date of the notice of bail forfeiture.*[2] To make this argument the People omit significant amounts of the statutory history of Penal Code section 1305, inaccurately present the legislative record of Penal Code section 1305, subdivision (j), as well as rely upon selective dictum.

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[2] This Court has held that pursuant to Penal Code section 1305, subdivision (b), the initial 185-day appearance period commences from the date that the notice of forfeiture is *mailed.* (*People v. Am. Contractors Indem. Co.* (2004) 33 Cal.4th 653, 658.)

A. The People's Depiction Of The History Of Penal Code Sections 1305, Subdivision (j) And 1305.4 Is Incorrect.

In their ABM, the People provide a narrative of the enactment and amendment of Penal Code section 1305 that is creative, but not accurate. To begin with, the People claim that when Penal Code section 1305 was reenacted in 1993, the statute "for the first time provided that if a surety timely filed a motion to vacate a *bail forfeiture order* within the appearance period on the statutorily-authorized grounds, the hearing could be held within 30 days after the last day of the appearance period." (ABM 35.) However, this is not true. As early as 1969 Penal Code section 1305 was amended to allow timely filed motions for forfeiture relief to be heard after the expiration of the appearance period.

> In 1969 the Legislature added the following pertinent provision to the section: 'Such notice of motion must be filed within 180 days after such entry in the minutes or mailing as the case may be, and must be heard and determined within 30 days after the expiration of such 180 days, unless the court for good cause shown, shall extend the time for hearing and determination.' (Stats. 1969, ch. 1259, pp. 2462--2464, ch. 1194, pp. 2327--2328; eff. Nov. 10, 1969.) As a result of the amendment, if a notice of motion is filed within 180 days the fact that the hearing is set for a date beyond that period does not divest the court of jurisdiction to act.

(*People v. Wilshire Ins. Co.* (1976) 61 Cal.App.3d 51, 56–57, FN 2.)

In 1985, Penal Code section 1305 was amended with the intention of creating a less formal process than requiring a notice motion for exonerating a bail bond when a bail fugitive was timely surrendered back to custody.

> [S]ection 1305 was amended to address notice requirements before the surety could obtain relief from forfeiture when the defendant was surrendered or a disability was established... (Stats. 1985, ch. 1486, § 1, p. 5482.) The amendment eliminated the requirement that the surety request a hearing and give notice of the motion to set aside the forfeiture. (See [*People v. Am. Bankers Ins. Co.* (1991) 233 Cal.App.3d 561, 566–567] [interpreting former section 1305].) However, the statute was interpreted to mean that: relief from a forfeiture was not automatic but still required the affirmative act of notice, "by application," on the part of the surety to obtain relief. ([*Id.* at pp. 566–567, 570].) The statute provided for a less formal procedure which eliminated the need for a hearing on the application, unless, after receiving such an application, a hearing was requested by the prosecution. (*Ibid.*)
>
> In 1993, section 1305 was repealed (Stats. 1993, ch. 524, § 1) and replaced with a new statute which dealt with the nonappearance of the defendant, vacating forfeiture, and exoneration of bonds. (*Ibid.*) Since 1993, although the statute has been amended in many other respects, the language of subdivision (c), relating to notice to vacate forfeiture where the defendant has appeared, has been surrendered, or is in custody, has remained the same.

(*People v. Am. Contractors Indem.* (1999) 74 Cal.App.4th 1037, 1046 *(American Contractors 1999).*)

By 1993, the prior version of Penal Code section 1305 had become a "convoluted prose of existing law pertaining to forfeiture" prompting the statute's reenactment in order to "recast the provisions relating to forfeiture of bail in a more readable form." (Cal. Bill Analysis, Senate Floor, Assem. Bill 734 (1993–1994 Reg. Sess.) August 17, 1993.) The 1993 reenactment of Penal Code section 1305 re-codified the calendaring language allowing a motion for bail forfeiture relief to be heard after the expiration of the initial appearance period (along with several other provisions) as Penal Code section 1305, subdivision (c). In 1994 Assembly Bill 3059 was passed and the identical calendaring language was placed into Penal Code section 1305, subdivision (c)(4). (Stats. 1993, ch. 524, § 1.)

The *American Contractors 1999* court later examined the 1993 reenactment of Penal Code section 1305 and its 1994 amendment and ruled that due to subdivision (c)(4)'s location within Penal Code section 1305, the Legislature must have intended for the "expedited notice" element of subdivision (c)(4) to only apply to the preceding subdivisions (c)(1), (c)(2) and (c)(3). (*American Contractors 1999*, *supra*, 74 Cal.App.4th at pp. 1047–1049.) The *American Contractors 1999* court then ruled that the *notice* requirements of Code of Civil Procedure section 1005 applied to motions for bail forfeiture relief made pursuant to other subdivisions of Penal Code section 1305, *except for* subdivisions (c)(1), (c)(2) and (c)(3). (*American Contractors 1999*, *supra*, at pp. 1047–1049) The People's argument is entirely predicated upon a view that the *American Contractors 1999* court's interpretation of the 1993 reenactment of Penal Code section 1305 and its 1994

amendment also intended for the *calendaring* provision of Penal Code section 1305, subdivisions (c)(4) to similarly only apply to subdivisions (c)(1), (c)(2) and (c)(3). (ABM 39–40.)

However, the legislative record of the 1993 reenactment and 1994 amendment evidences that the calendaring language of what became Penal Code section 1305, subdivision (c)(4) was intended to apply to "any" motion made pursuant to Penal Code section 1305.

> The main substantive portion of this bill is the provision which extends the time during which a surety may appear in court with a motion to vacate the forfeiture... Under this bill, the surety will have a five day grace period at the end of the 180 days, and the court will have until 30 days *after that period* to hear <u>*any*</u> motion.

(Cal. Bill Analysis, Assembly Committee, Assem. Bill 734 (1993–1994 Reg. Sess.) May 8, 1993 (emphasis added). See also Cal. Bill Analysis, Senate Committee, Assem. Bill 734 (1993–1994 Reg. Sess.) June 23, 1993 [which adds the language "...a motion filed with the 180 days to be heard up to 30 days after the expiration of the period, *or longer for good cause*" (emphasis added)].)

Additionally, the express purpose of Assembly Bill 3059 was to allow for the automatic exoneration of bail upon the timely reappearance of a bail fugitive and further clarify the statute.

> The purpose of this bill is to provide that if the court fails to act in accordance of the law, the bond shall be vacated and exonerated automatically.... According to the author, prior legislation he sponsored, AB 734,

> made both technical and substantive changes to the Penal Code section 1305. As the law is being implemented, there is a need for clarifying the language of the bill. AB 3059 further amends Section 1305 by adding those provisions.

(Cal. Bill Analysis, Assembly Committee, Assem. Bill 3059 (1993–1994 Reg. Sess.) August 19, 1994 (emphasis added).)

Nowhere in the analyses of Assembly Bill 3059, or the amendments of the bill, is there any discussion of limiting the calendaring of a motion hearing made pursuant to Penal Code section 1305, subdivision (c)(4), to only subdivisions (c)(1), (c)(2), (c)(3), or that a hearing pursuant to subdivision (c)(4) would have to take place within the appearance period. Instead, the calendaring language allowing for a hearing to take place after the expiration of the appearance period remained unchanged throughout the 1993 reenactment of Penal Code section 1305 and its 1994 amendment. Despite the *American Contractors 1999* court's interpretation of former Penal Code section 1305, subdivision (c)(4)'s notice requirement, the *actual* legislative record of 1993 reenactment and 1994 amendment to Penal Code section 1305 demonstrate that the Legislature intended that a timely made motion for *any* forfeiture relief could "be heard up to 30 days after the expiration of the [appearance] period, or longer for good cause."

However, the People argue that according to the *American Contractor 1999* decision, when the Legislature enacted Penal Code section 1305.4 in 1996, the Legislature did so under the belief that hearings pursuant to section 1305.4 must be held within the appearance period, and ergo the "from its order"

language of section 1305.4 must also mean an order made within the appearance period. (ABM 40–41, 45.) Although there is no support for this claim in the legislative record, any questions there *may* have been as to when a hearing for a motion to extend time under Penal Code section 1305.4 could be held (and an extension ordered) were directly addressed when the Legislature passed Assembly Bill 476 in 1999.

Assembly Bill 476 was passed following the decision in *Cnty. of Los Angeles v. Nat'l Auto. & Cas. Ins. Co.* (1998) 67 Cal.App.4th 271, a case the People neglect to cite. As the Legislature explained:

> A recent decision of the Court of Appeal of California - *Co. of Los Angeles v. National Automobile & Casualty* (1998) 67 Cal.App.4th 267 - held that a motion to toll the 180-day period during which forfeited bail may be exonerated must be heard and granted before the expiration of the 180-day period or the court loses jurisdiction to act in the bail matter... While the *National* case involved a request to toll the 180-day forfeiture exoneration time limit because of a temporary disability of the defendant in Penal Code section 1305, subdivision (e), there appears to be no reason that such a ruling would not apply under the more general tolling/extension provision in Penal Code section 1305.4.
>
> ****
>
> The purpose of this bill is to... ease the requirements for avoiding forfeiture.
>
> This bill provides that a timely-filed *motion to extend* the 180-day period allowing exoneration of bail *may*

> *be heard within 30 days of the expiration of the 180 period*, and that the 30-day period can be extended for good cause.

(Cal. Bill Analysis, Senate Committee, Assem. Bill 476 (1999–2000 Reg. Sess.) July 13, 1999 (emphasis added).)

Assembly Bill 476 was chaptered on September 29, 1999 and became effective on January 1, 2000. To make certain it was understood, the Legislature moved the exact calendaring language of then Penal Code section, subdivision (c)(4) to its own subdivision, (i). Assembly Bill 476 also amended Penal Code section 1305.4 to specifically reference the calendaring language of Penal Code section 1305, subdivision (i), within Penal Code section 1305.4. This identical calendaring language now exists as Penal Code section 1305, subdivision (j), and remains referenced within Penal Code section 1305.4.

Notwithstanding the *full* history of Penal Code sections 1305 and 1305.4, the People rely heavily on *People v. Taylor Billingslea Bail Bonds* (1999) 74 Cal.App.4th 1193 *(Taylor Billingslea)*, which was decided on September 15, 1999. (ABM 41–43.) As was pointed out to the People in *Williamsburg* (and ignored by the Court of Appeal in this case), *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." (*Williamsburg*, *supra*, 235 Cal.App.4th at p. 951, fn. 7.) Moreover, *Taylor Billingslea* holds that multiple 180-day

long extensions are impermissible under Penal Code 1305.4, not that an extension must be calculated from *the mailing date of the notice of forfeiture*. (See OBM 45–46.)

The additional authority cited by the People is equally unpersuasive. *People v. Bankers Ins. Co.* (2010) 182 Cal.App.4th 1377 and *People v. Accredited Surety and Casualty Co., Inc.* (2013) 220 Cal.App.4th 1137 both are focused on the timing of entry of summary judgment pursuant to Penal Code section 1306. These cases' discussion of the calculations of extensions of the appearance period all rely upon *Taylor Billingslea's* legislative analysis for authority and do not make an independent inquiry into the statutory history of Penal Code section 1305 and 1305.4 themselves.

The calendaring language of Penal Code section 1305, subdivision (j), has been part of California law since 1969. Starting with its inception in 1872 the overall arc of Penal Code section 1305 has been to provide bail sureties with more time to search for bail fugitives (from the "final adjournment of court" – to a 90-day appearance period – to a 180-day appearance period – to a 185-day appearance period – to a 185-day appearance period, plus a possible 180 days of extension time). There are no irreconcilable differences, or even ambiguities, needing to be "harmonized" between Penal Code section 1305, subdivision (c)(4) of 1996 and Penal Code section 1305, subdivision (j) of 2016. Further, it is the People's interpretation of when an extension of time can be calculated that leads to "inconsistencies." Calculating an extension of time from a court's "order" gives full meaning to Penal Code section 1305, subdivision (j), and is consistent with Penal Code section 1306. (See *People v. Aegis*, *supra*, 130

Cal.App.4th 1071; see also OBM 55–59.) Moreover, on a practical level, it is much easier for a busy trial court granting an extension of the appearance period to calculate the how much extension time it intends to grant from the date of *its order*, rather than determining when the *notice* of forfeiture was *mailed* (as opposed to the actual date of forfeiture) and relating back to that date (effectively shortening an extension), plus taking into consideration any previous extensions.

The Legislature made clear its intention in this issue: Penal Code section 1305.4 allows a trial court to order an extension of the appearance period to commence "from its order," "after a hearing" that can be held 30 days after the expiration of the appearance period, or possibly longer, *and* that case law suggesting otherwise is incorrect. Accordingly, the People's theory that an erroneous and superseded 1999 interpretation of the 1996 version of Penal Code section 1305 requires this Court to ignore an explicit and contradictory 2000 amendment to the statute, as well as the plain language of the current statute, in order to calculate an extension of the appearance period retroactively from the mailing of the notice of forfeiture – is unfounded.

III. THE PEOPLE SHOULD BEAR A BURDEN IN ORDER TO HALT THE EXTENSION OF A DEMONTRABLY DILIGENT BAIL FUGITIVE INVESTIGATION

The Surety believes that the standard for establishing "good cause" under Penal Code section 1305.4 should be a measure of a surety's diligence in its investigation of a bail fugitive, rather

than *anyone's* guess as to the "likelihood" of a bail fugitive's apprehension. Given that public policy strongly favors having bail sureties actively searching for bail fugitives for as long as statutorily possible, the Surety believes that such a standard adequately furthers the objectives of Penal Code section 1305.4 and the purpose of the bail bond system. Accordingly, if the People wish to halt a diligent bail investigation, the People should be required to demonstrate a compelling reason for doing so. The Surety further notes that while the People argue against having to meet such a burden on the basis that a surety has "exclusive" access to the details of a bail fugitive investigation, Penal Code section 1305.4 requires that "good cause" be determined from the contents of an affidavit or declaration served upon the People prior to a noticed hearing that can be continued. Moreover, the State of California wields significant investigatorial resources that could assist the People in meeting such a burden – apparently enough resources that the People seek to affirm a "good cause" standard that can serve to terminate a diligent surety investigations and leave the task of locating a bail fugitive solely to the State.

CONCLUSION

For the foregoing reasons, along with those set forth in the Surety's OBM, this Court should reverse the decisions of the Courts of Appeal in this case, as well as *Accredited 2015*, and find that a demonstration of a "likelihood of apprehension" is not required under Penal Code section 1305.4. In addition, pursuant to Penal Code sections 1305.4 and 1305, subdivision (j), an

extension of the appearance period is calculated from the date a trial court makes an order of extension. Further, given that the investigation in this case has been irreparably prejudiced by the two and half years (at the time of this filing) required to litigate this matter following the denial of the Surety's motion to extend the appearance period, the Surety requests that bail bond number FCS1250–929280 be ordered exonerated.

Law Office of John Rorabaugh

Respectfully submitted,

Dated: February 22, 2016

By: ORIGINAL SIGNED

John M. Rorabaugh

Attorney for Defendant 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 **8,400** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, 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.

Law Office of John Rorabaugh

Dated: February 22, 2016 By: ORIGINAL SIGNED

John M. Rorabaugh

Attorney for Defendant and Appellant

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S229446

PROOF OF SERVICE

I declare:

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Los Angeles County Office of the County Counsel
648 Kenneth Hahn Hall of Administration
500 W. Temple Street
Los Angeles, CA 90012-2713
(for People of the State of California)

Los Angeles County Superior Court
Attn: Hon. Harvey Giss
Airport Courthouse
11701 S. La Cienega
Los Angeles, CA, 90045

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clainez@bailhotline.net
(for Bail Hotline Bail Bonds, as agent for Financial Casualty & Surety, Inc)

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

Dated: February 22, 2016 By: ORIGINAL SIGNED

Crystal Rorabaugh