

Date of Hearing: April 11, 2023
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1378 (Essayli) – As Amended March 9, 2023

SUMMARY: Makes the violation of a protective order issue based on victim or witness intimidation or threats punishable in the alternative as a misdemeanor or state prison felony. Makes the violation punishable as a state prison felony if the person was armed with a firearm. Specifically, **this bill:**

- 1) Makes an intentional and knowing violation of a criminal protective order issued based on victim or witness intimidation or threats punishable as a misdemeanor by up to one year in the county jail, or as a felony for 16 months, two years, or three years in state prison, and/or a fine of up to \$1,000.
- 2) Makes the violation punishable as a state prison felony for two, three, or four years if the person was armed with a firearm.
- 3) Makes conforming changes.

EXISTING LAW:

- 1) Authorizes the trial court in a criminal case to issue protective orders when there is a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur. (Pen. Code, § 136.2, subd. (a).)
- 2) Provides that a person violating a protective order may be punished for any substantive offense described in provisions of law related to intimidation of witnesses or victims, or for contempt of court. (Pen. Code, § 136.2, subd. (b).)
- 3) Requires a court to consider issuing a restraining order lasting up to 10 years protecting victims for convictions including, but not limited to domestic violence, certain types of human trafficking, gang activity, statutory rape, pimping of a minor, and offenses requiring sex offender registration. (Pen. Code, §§ 136.2, subd. (i)(1); 273.5, subd. (j); 368, subd. (l); 646.9, subd. (k); 1201.3, subd. (a).)
- 4) Provides that a post-conviction protective order may be issued by the court regardless of whether the defendant is sentenced to the state prison, or a county jail, or subject to mandatory supervision, or whether the defendant is placed on probation. The duration of a protective order issued by the court should be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and the victim's immediate family. (Pen. Code, § 136.2, subd. (i)(1).)

- 5) Requires a court to consider issuing a restraining order up to 10 years long protecting percipient witness, upon clear and convincing evidence of witness harassment, in cases with convictions including, but not limited to domestic violence, statutory rape, gang activity, and sex registerable offenses. (Pen. Code, § 136.2, subd. (i)(2).)
- 6) Authorizes a court to place conditions on a 10-year restraining order that can include electronic monitoring for up to one year, as specified. (Pen. Code, § 136.2, subd. (i)(3).)
- 7) Provides that a person subject to a protective order shall not own, possess, purchase, or receive, or attempt to purchase or receive, a firearm while the protective order is in effect. (Pen. Code, § 136.2, subd. (d)(1).)
- 8) Provides that a person who purchases, or receives, or attempts to purchase or receive, a firearm while knowing that the protective order is in effect is punishable by up to one year in the county jail as a misdemeanor, or in state prison for 16 months, two years, or three years, and/or by a fine up to \$1,000, or both. (Pen. Code, §§ 136.2, subd. (d)(1), 29825, subd. (a).)
- 9) Provides that a person who owns or possesses a firearm while knowing that the protective order is in effect is punishable by up to one year in the county jail as a misdemeanor, by a fine up to \$1,000, or by both. (Pen. Code, §§ 136.2, subd. (d)(1), 29825, subd. (b).)
- 10) Punishes an individual for willful disobedience of, among other things, a lawful protective order as a misdemeanor by up to one year in the county jail and/or a fine up to \$1,000. (Pen. Code, § 166, subd. (c)(1).)
- 11) Makes a second or subsequent conviction for a violation of a lawful protective order occurring within seven years of a prior conviction for a violation and involving an act of violence or “a credible threat” of violence, as provided, punishable by imprisonment in a county jail not to exceed one year, or in the state prison for 16 months, or two, or three years. (Pen. Code, § 166, subd. (c)(4).)
- 12) States that except as provided, a person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment for one year pursuant to realignment, unless the arming is an element of that offense. This additional term shall apply to a person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm. (Pen. Code, § 12022, subd. (a)(1).)¹
- 13) Provides that any person who personally uses a firearm in the commission or attempted commission of a felony, in addition and consecutive to the punishment for the underlying felony offense, shall be sentenced to a term of 3, 4, or 10 years in state prison, unless the use of a firearm is an element of the offense for which they are convicted. A person who personally uses an assault weapon or machine gun during the commission of a felony or

¹ Armed has been interpreted to mean available for use. (*People v. Delgadillo* (2005) 132 Cal. App. 4th 1570, 1574.)

attempted felony is subject to an additional consecutive term of 5, 6, or 10 years in state prison. (Pen. Code, § 12022.5, subds. (a) & (b).)²

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, “AB 1378 is a common sense approach that allows for more judicial discretion in the cases of a protective order violation. AB 1378 makes it possible for the first violation to be punishable as either a misdemeanor or a felony at the discretion of the court. Furthermore, AB 1378 specifically addresses situations where the violator is armed with a firearm during the violation of a protective order, and makes such violations punishable as a felony.”
- 2) **Protective Orders, Generally:** As a general matter, a court can issue a restraining order in any criminal proceeding pursuant to Penal Code section 136.2, subdivision (a)(1), upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur. Protective orders issued under this portion of the statute are valid only during the pendency of the criminal proceedings. (*People v. Ponce* (2009) 173 Cal.App.4th 378, 382.)

Specific to domestic violence and offenses requiring sex offender registration, the case file must be clearly marked so that the court is aware of their nature for purposes of considering a protective order. (Pen. Code, § 136.2, subd. (e)(1).) The court has the authority to issue pre- and post-conviction protective orders. (*People v. Lopez* (2002) 75 Cal.App.5th 227.) When a defendant has been convicted of domestic violence, as defined, and rape, statutory rape, spousal rape, or any crime requiring sex offender registration, it can issue a protective order lasting up to 10 years. (Pen. Code, § 136.2, subd. (i)(1).)

Violation of a protective order is punishable as contempt of court, as a misdemeanor, by up to one year in the county jail. (Pen. Code, §§ 136.2, subd. (b), 166, subd. (c)(1).) A second or subsequent conviction for a violation of an order occurring within seven years of a prior conviction for a violation of an order and involving an act of violence or “a credible threat” of violence is punishable as a misdemeanor by imprisonment in a county jail not to exceed one year, or as a felony in the state prison for 16 months or two or three years. (Pen. Code, § 166, subd. (c)(4).)

This bill would make a first violation of these protective orders alternatively punishable as a misdemeanor by up to a year in the county jail or as a felony by 16 months, two years, or three years. If a firearm is used, it would be punishable as a felony by two, three, or four years in state prison.

However, contempt of court is not the only option available to a prosecutor when the

² The firearm need not be operable or loaded. (*People v. Nelums* (1982) 31 Cal.3d 355, 360; see *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795.) Someone personally uses a firearm if they intentionally display the firearm in a menacing manner, hits someone with the firearm, or fires the firearm. (*People v. Bland* (1995) 10 Cal.4th 991, 997; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320; see also Pen. Code, § 1203.06, subd. (b)(2).)

violation of a protective order is based on intimidation or threats against a victim or witness to a crime. Under current law, the person violating the order may be punished for specified substantive offenses underlying the issuance of the order. For example, if the person violates the order by knowingly and maliciously preventing or dissuading, or attempting to prevent or dissuade, any witness or victim from attending or giving testimony at any trial or proceeding, the offense can be punished as a felony by 16 months, two years, or three years in state prison. (Pen. Code, §§ 136.1, subd. (a)(1), 136.2, subd. (b).) If they are armed with a firearm – i.e., have a firearm available for use – they can receive an additional year of punishment. (Pen. Code, § 12022, subd. (a)(1).) If a firearm is used – i.e., displayed in a menacing manner – the person could receive up to an additional 10 years. (Pen. Code, § 12022.5, subd. (a).) Additionally, criminal threats is a separate offense punishable by up to three years in state prison, on top of which firearm enhancements may be added. (Pen. Code, § 422.)

- 3) **Lack of Enforcement of Restraining Orders:** According to the managing staff attorney at Jenesse Center, a non-profit domestic violence prevention and intervention organization, the enforcement of restraining orders lacks the priority they feel it should have. “One of the overarching concerns . . . is that police do not fully understand and are unprepared to respond adequately to domestic violence calls....It comes up repeatedly with our client population. ‘You know, I have this restraining order, he continues to violate it, the police aren’t doing anything’” (<https://xtown.la/2021/11/15/domestic-violence-restraining-order/>)

“[I]n 2020, the LAPD received 5,126 calls about domestic violence restraining orders, but only filed 765 reports of restraining order violations, less than 15% of the total.” (<https://xtown.la/2021/11/15/domestic-violence-restraining-order/>) According to the coordinator of the Los Angeles Police Department’s domestic violence unit, officers may have difficulty enforcing restraining orders because they first need to ensure the order is valid when they get to the scene – i.e., that the accused was properly notified of the order. Officers also do not receive enough training about domestic violence and responding to those calls. (*Ibid.*)

- 4) **Practical Considerations:** The bill states the enhanced punishment for firearm use applies to paragraphs (1) and (2). There is no paragraph (2).
- 5) **Argument in Support:** According to the *California District Attorneys Association*, “California has long recognized that intimidation of victims and witnesses poses an unacceptable threat to the pursuit of justice. Such intimidation is outlawed by Penal Code section 136.1, and courts are authorized under Penal Code section 136.2 to issue what is known as a criminal protective order when there is ‘good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur.’

“Under current law a violation of a criminal protective order that does not involve any other crime is punishable as contempt of court under Penal Code section 166. (See Pen. Code, § 136.2, subd. (b).) This requires the violation be treated as a misdemeanor unless the defendant has already been convicted of violating a protective order within seven years and the current violation involves an act or threat of violence. (Pen. Code, § 166, subd. (c).)

“AB 1378 recognizes that, in some instances, even a first-time violation of a criminal protective order represents such an affront to the safety of the victim and to the ends of

justice that the crime should be prosecuted as a felony. AB 1378 would therefore permit it to be prosecuted as a misdemeanor or a felony. AB 1378 recognizes, further, that any time a violation of a criminal protective order is committed with a firearm, the actual and potential harm to victims and the disruption of justice is even greater, and thus the bill would permit enhanced felony penalties when firearms are involved.

- 6) **Argument in Opposition:** According to the *California Public Defenders Association*, “Individuals subject to a criminal protective order are frequently individuals who are experiencing their first contact with the criminal justice system. In most cases these individuals represent families in crisis and attempting to manage not only the criminal justice system while caring for and raising children. The wide range of cases where such an order can be imposed and where such order is frequently imposed against the will of the protected person abound. While we recognize that disobedience of a court order does require consequences, those consequences for the first offense are appropriately limited to a misdemeanor level.

“Providing for an escalated deterrent for repeatedly violating a criminal protective order makes both fiscal and logical sense. A misdemeanor offense for such a violation carries up to 364 days in a county jail facility, which is no small sanction and is more than sufficient to vindicate the goals of the order initially, providing the court with up to a year of discretion with sentencing. If that proves to be an insufficient sanction, then the second violation could result in up to three-years of incarceration.

“The taxpayer costs associated with this bill would be high and of little deterrent value. Creating felony punishment for a single violation of an order, frequently before the underlying offense has even been adjudicated would be monumentally expensive. AB 1378’s proposed punishment for violating the protective order would be harsher in most cases than the punishment for underlying offense resulting in the order.

“Lastly, and most importantly, there is no empirical evidence offered by the author that increased punishment deters individuals from violating criminal protective orders. Although the research shows that longer sentences in general do not deter crime, this finding would be particularly true of individuals who are either emotionally distraught due to breakup of a relationship or are suffering from mental illness.”

7) **Related Legislation:**

- a) AB 36 (Gabriel) would, among other things, prohibit a person subject to protective orders, as specified, issued on or after July 1, 2024, from owning, possessing, purchasing, or receiving a firearm or ammunition within three years after the expiration of the order and make a violation of this provision a crime. AB 36 is pending hearing in the Assembly Judiciary Committee and this committee.
- b) AB 467 (Gabriel) clarifies that a court that sentenced a defendant and issued a 10-year criminal protective order, may make modifications to it throughout the duration of the order. AB 467 has been read a second time and ordered to third reading.

8) Prior Legislation:

- a) AB 2040 (Maienschein), of the 2021-2022 Legislative Session, would have made the violation of certain domestic violence-related protective orders, which involve forcible entry into, or unlawful presence in, the protected person's "residential dwelling," punishable by a minimum of 30 days in the county jail, unless the sentence is not in the interest of justice. AB 2040 was held in the Assembly Appropriations Committee.
- b) SB 935 (Min), Chapter 88, Statutes of 2022, clarified that certain protective orders issued under the Domestic Violence Protection Act (DVPA) may be renewed more than once.

REGISTERED SUPPORT / OPPOSITION:**Support**

Arcadia Police Officers' Association
Burbank Police Officers' Association
California District Attorneys Association
Claremont Police Officers Association
Corona Police Officers Association
Crime Victims Alliance
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
Los Angeles School Police Officers Association
Murrieta Police Officers' Association
Newport Beach Police Association
Palos Verdes Police Officers Association
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
Santa Ana Police Officers Association
Upland Police Officers Association

Opposition

California Public Defenders Association (CPDA)

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