
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No: AB 764 **Hearing Date:** July 13, 2021
Author: Cervantes
Version: March 24, 2021
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Contempt of court: victim intimidation*

HISTORY

Source: San Diego District Attorney's Office

Prior Legislation: AB 289 (Spitzer), Ch. 582, Stats. 2007
SB 1796 (Leslie), Ch. 825, Stats. 1997
AB 2224 (Kuehl), Ch. 904, Stats. 1996

Support: California Coalition of School Safety Professionals; California State Sheriffs' Association; Los Angeles School Police Officers Association; Palos Verdes Police Officers Association; Riverside Sheriffs' Association; Santa Ana Police Officers Association

Opposition: JVP Action Greater Los Angeles

Assembly Floor Vote: 76 - 0

PURPOSE

The purpose of this bill is to specify that a person who is the subject of a restraining order who has previously been convicted of stalking, may be punished for contempt of court punishable by a maximum of one year in jail, for willfully contacting a victim by social media, electronic communication, or by electronic device.

Existing law provides that any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking. This crime is punishable by imprisonment in the county jail for not more than one year, or by imprisonment in the state prison. (Pen. Code, § 646.9, subd. (a).)

Existing law defines "harasses" for purposes of stalking to mean engages in a knowing and willful course of conduct directed at a specific person and seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose. (Pen. Code, § 646.9, subd. (e).)

Existing law defines "course of conduct" as two or more acts occurring over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct." (Pen. Code, § 646.9, subd. (f).)

Existing law defines “electronic communication device” for purposes of “credible threats” under stalking as including, but not being limited to, telephones, cellular phones, computers, video recorders, fax machines, or pagers. “Electronic communication” means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, except as specified. (Pen. Code, § 646.9, subd. (h).)

Existing law provides that the sentencing court may order a person convicted of felony stalking to register as a sex offender and shall consider issuing a restraining order protecting the victim that is valid for up to 10 years. (Pen. Code, § 646.9, subs. (d) & (k).)

Existing law 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).)

Existing law 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).)

Existing law requires a court to consider issuing a protective order that may be valid for up to 10 years, to protect the victim of the crime when a defendant is convicted of any of the following crimes: a crime involving domestic violence; human trafficking for labor or services; rape, spousal rape, and statutory rape; pimping and pandering; gang offenses; and, any offense requiring sex offender registration. (Pen. Code, § 136.2, subd. (i)(1).)

Existing law states that a person who commits the following acts is guilty of contempt of court, punishable as a misdemeanor with up to 6 months imprisonment in jail and a fine of up to \$1000:

- Disorderly, contemptuous, or insolent behavior committed during the sitting of a court of justice, in the immediate view and presence of the court, and directly tending to interrupt its proceedings or to impair the respect due to its authority.
- Behavior specified in paragraph (1) that is committed in the presence of a referee, while actually engaged in a trial or hearing, pursuant to the order of a court, or in the presence of any jury while actually sitting for the trial of a cause, or upon an inquest or other proceeding authorized by law.
- A breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of the court.
- Willful disobedience of the terms as written of any process or court order or out-of-state court order, lawfully issued by a court, including orders pending trial.
- Resistance willfully offered by any person to the lawful order or process of a court.
- The contumacious and unlawful refusal of a person to be sworn as a witness or, when so sworn, the like refusal to answer a material question.
- The publication of a false or grossly inaccurate report of the proceedings of a court.

- Presenting to a court having power to pass sentence upon a prisoner under conviction, or to a member of the court, an affidavit, testimony, or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon the prisoner, except as provided in this code.
- Willful disobedience of the terms of an injunction that restrains the activities of a criminal street gang or any of its members, lawfully issued by a court, including an order pending trial. (Pen. Code, § 166, subd. (a).)

Existing law states that a person who willfully and knowingly violates those court orders may be punished for any substantive offenses including stalking and that a finding of contempt is not a bar to prosecution for the substantive offense. Similarly, a conviction or acquittal for the substantive offense is not a bar to a subsequent punishment for contempt arising out of the same act. (Pen. Code, § 166, subd. (e)(5).)

Existing law provides that the willful and knowing violation of specified protective or stay-away orders are subject to the higher misdemeanor penalty of up to one year in jail and a maximum fine of \$1000. (Pen. Code, § 166, subd. (c).)

Existing law states that a person who is guilty of contempt of court by willfully contacting a victim by telephone or mail, or directly, and who has been previously convicted of stalking, is punishable by imprisonment in the county jail for not more than one year, by a fine of \$5000, or by both the fine and imprisonment. (Pen. Code, § 166, subd. (b)(1).)

This bill adds social media, electronic communication, or electronic communication device as additional means of contacting the victim for purposes of the above paragraph.

This bill provides the following definitions:

- “Social media” means “an electronic service or account, or electronic content, including, but not limited to, videos or still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations,” as provided by cross-reference to Penal Code Section 632.01 related to invasion of privacy.
- “Electronic communication” includes, but is not limited to, “telephones, cellular phones, computers, video recorders, fax machines, or pagers,” as provided by cross-reference to Penal Code Section 422 related to criminal threats.
- “Electronic communication device” means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce,” except as specified, as provided by cross-reference to Penal Code has Section 422 which provides a cross-reference to federal law.

COMMENTS

1. Need for This Bill

According to the author of this bill:

Existing law provides only incomplete protection to survivors to whom the courts have provided a protective order against a convicted perpetrator of stalking. As currently written, the law only punishes violations of such a protective order that are made in person, over the telephone, or using physical mail. This loophole clearly does not reflect the reality of the 21st Century. Prohibited contacts are now also attempted using social media, text messaging, email, or other electronic means. This loophole has only become more apparent during the COVID-19 pandemic, as public health mitigation measures such as stay-at-home orders and physical distancing have only made harassment of survivors over social media and other electronic means more prevalent.

Assembly Bill 746 will close this loophole by adding social media and other electronic means of communication to the statutory list of prohibited forms of contact. This will provide survivors of stalking who have a court-ordered protective order with the security they both need and deserve.

2. Restraining Orders, Generally

As a general matter, a court can issue a restraining order in any criminal proceeding pursuant to Penal Code Section 136.2 where it finds 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 statute are valid only during the pendency of the criminal proceedings. (*People v. Ponce* (2009) 173 Cal.App.4th 378, 382.)

When criminal proceedings have concluded, the court has the authority to issue restraining orders as a condition of probation in cases where probation was granted. In some cases in which probation has not been granted, the court also has the authority to issue post-conviction protective orders. The court is authorized to issue no-contact orders for up to 10 years when a defendant has been convicted of willful infliction of corporal injury to a spouse, former spouse, cohabitant, former cohabitant, or the mother or father of the defendant's child. The court can also issue no-contact orders lasting up to 10 years in cases involving a domestic violence-related offense, rape, spousal rape, statutory rape, or any crime requiring sex offender registration. (Pen. Code, § 136.2, subd. (i)(1).) The same is true of stalking cases. (Pen. Code, § 646.9, subd. (k)).

3. Contempt of Court for Violations of a Protective Order

Disobedience of a court order may be punished as contempt of court. The crime of contempt is a general intent crime. It is proven by showing that the defendant intended to commit the prohibited act, without any additional showing that he or she intended “to do some further act or achieve some additional consequence.” (*People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4.) Nevertheless, a violation must also be willful, which in the case of a court order encompasses both intent to disobey the order, and disregard of the duty to obey the order.” (*In re Karpf* (1970) 10 Cal.App.3d 355, 372.)

Criminal contempt under Penal Code Section 166 is generally a misdemeanor, and so proceedings under the statute are conducted like any other misdemeanor offense. (*In re McKinney* (1968) 70 Cal.2d 8, 10; *In re Kreitman* (1995) 40 Cal.App.4th 750, 755.) Therefore, the criminal contempt power is vested in the prosecution; the trial court has no power to institute criminal contempt proceedings under the Penal Code. (*In re McKinney*, supra, 70 Cal.2d at p. 13.) A defendant charged with the crime of contempt is “entitled to the full panoply of substantive and due process rights.” (*People v. Kalnoki* (1992) 7 Cal.App.4t Supp. 8, 11.) Therefore, the defendant has the right to a jury trial, regardless of the sentence imposed. (*People v. Earley* (2004) 122 Cal.App.4th 542, 550.)

There are certain violations of protective orders that are punished with an enhanced misdemeanor sentence. As relevant to this bill, a person who willfully contacts a victim by telephone or mail, or directly, when the person has been convicted of stalking, is subject to the enhanced misdemeanor punishment of imprisonment of up to one year in county jail, and a fine of \$5000. This bill adds social media, electronic communication device and electronic communication as additional means of contacting the victim that are prohibited under that paragraph.

The definitions for electronic communication device and electronic communication in the bill cross-references Penal Code section 422, the criminal threats statute. However, this same definition appears in Penal Code section 646.9, the stalking statute. Since this bill affects persons convicted of stalking, perhaps a cross-reference to the stalking statute is more appropriate. Additionally, “electronic communications” has been interpreted to encompass communication via social media, thus specifying social media appears to be redundant.

3. Argument in Support

According to San Diego District Attorney’s Office, the sponsor of this bill:

California law provides for various protections for victims who have been subjected to the crime of stalking. These crimes are some of the most emotionally and psychologically damaging, resulting in lasting impacts long after the actual crime has been committed. Penal Code section 166(b)(1) provides protections for stalking victims after a court order has been issued protecting victim from further contact by the perpetrator. However, the language related to contacts using “telephone and mail” are rather outdated. AB 764 simply updates the language of the statute to include “social media, electronic communication, or electronic communication device.”

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