
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No: SB 853 **Hearing Date:** May 27, 2020
Author: Hurtado
Version: March 16, 2020
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Restraining Orders: Duration*

HISTORY

Source: Tulare County District Attorney's Office

Prior Legislation: AB 264 (Low), Ch. 270, Stats. 2017
AB 307 (Campos), Ch. 291, Stats. 2013
SB 723 (Pavley), Ch. 155, Stats. 2011
SB 834 (Florez), Ch. 627, Stats. 2010
AB 289 (Spitzer), Ch. 582, Stats. 2007

Support: California District Attorneys Association; California Police Chiefs Association; California State Sheriffs' Association; Crime Victims United of California; Los Angeles County District Attorney; Madera County District Attorney's Office; Riverside Sheriffs' Association; San Mateo District Attorney's Office

Opposition: Alliance For Constitutional Sex Offense Laws; American Civil Liberties Union of California; California Attorneys for Criminal Justice; California Public Defenders Association; Initiate Justice; Re:Store Justice; San Francisco Public Defender

PURPOSE

The purpose of this bill is to require the court to consider issuing a post-conviction restraining order for up to the duration that a defendant is required to register as a sex offender.

Existing law provides that any person who knowingly and maliciously prevents or dissuades, or attempts to prevent or dissuade, any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law is guilty of a crime. (Pen. Code, § 136.1, subds. (a)(1) & (2).)

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 the court to issue a protective order as a condition of probation in domestic violence cases, as specified. (Pen. Code, § 1203.097.)

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) A crime involving domestic violence, as specified;
- b) Cases of rape, spousal rape, and statutory rape;
- c) Any offense requiring sex offender registration;
- d) Stalking cases; and
- e) Elder and dependent adult abuse cases. (Pen. Code, §§ 136.2, subd. (i)(1); 646.9, subd. (k); 368, subd. (l).)

Existing law provides that the post-conviction protective order authorized above 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 imposition of sentence is suspended and the defendant is placed on probation. It is the intent of the Legislature in enacting this subdivision that the duration of a restraining order issued by the court be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of a victim and the victim's immediate family. (Pen. Code, § 136.2, subd. (i)(1).)

Existing law states that where a person committed to prison for a sex offense for which registration is required under Penal Code section 290 is released on parole, the Department of Corrections and Rehabilitation (CDCR), in an appropriate case, shall make an order that the parolee not contact or communicate with the victim of the crime, or any of the victim's family members. (Pen. Code, § 3053.6, subd. (a).)

Existing law states that where a victim, or an immediate family member of the victim request the parolee not contact him or her, the order shall be made. (Pen. Code, § 3053.6, subd. (b).)

Existing law provides that the the district attorney of the county that prosecuted the defendant for the sex crime for which the parolee was committed to prison may be available to facilitate and assist the victim, or victim's family member, in stating to CDCR whether or not the order that the parolee not contact or communicate with him or her shall be made. (Pen. Code, § 3053.6, subd. (d).)

Existing law allows the court to issue civil harassment protective orders for up to five years upon a showing of clear and convincing evidence. (Civ. Pro. Code, §§ 527.6.)

Existing law allows the court to issue workplace violence protective orders for up to three years upon a showing of clear and convincing evidence. (Civ. Pro. Code, § 527.8.)

This bill would, commencing January 1, 2022, require the court to consider issuing a post-conviction protective order in specified felony offenses that requires registration as a sex offender to be valid up to the duration of the period of registration.

COMMENTS

1. Need for This Bill

According to the author of this bill:

Existing law requires a court with jurisdiction over a criminal matter to consider issuing a protective order, which may be valid for up to 10 years, in a case in which the defendant has been convicted of specified sex crimes, including rape, spousal rape, and crimes for which a person is required to register as a sex offender. Under existing law, contempt of a court order is a misdemeanor, which is a criminal offense.

When the perpetrator is released from prison, a protective order initiates and runs its course. After 10 years, the criminal court has no jurisdiction. For a survivor of sexual assault to seek an additional protective order, they must return to civil court, request a hearing, and face their perpetrator, which effectively means reliving their trauma.

Senate Bill 853 aims to protect survivors of sexual assault from their perpetrator allowing the court to consider extending a protective order for the length of time which a person is required to register as a sex offender.

2. Protective Orders Generally; Probation and Parole Conditions

As a general matter, a court can issue a protective 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 protective 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)).

Similarly, in cases involving a criminal conviction or juvenile adjudication for a sex offense in which the victim was a minor, the court may issue an order “that would prohibit ... harassing, intimidating, or threatening the victim or the victim’s family members or spouse.” (Pen. Code, § 1201.3, subd. (a).) The court also has authority to issue no-contact orders lasting up to 10 years in cases involving the abuse of an elder or dependent adult. (Pen. Code, § 368, subd. (l).)

Additionally, when a person is on parole supervision, the parole board and the parole agent have broad powers to place conditions on the person which may include stay-away orders or travel

restrictions. Generally, a parole condition will be upheld unless “it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality” (*In re Hudson* (2006) 143 Cal.App.4th 1, 9, citing *People v. Lent* (1975) 15 Cal.3d. 481, 486.) A violation of a parole condition may result in a return to custody. (Pen. Code, § 3000.08.) When released on parole, the “greatest weight [must be given] to the protection of the victim and the safety of the community” in determining which county to place the person. (Pen. Code, § 3003.) A person may be placed on parole for 3, 5 or 10 years, and sometimes life. (Pen. Code, § 3000, 3000.1.)

In the context of sex offenders, current law provides that where a person who is required to register as a sex offender is being released on parole, the person can be ordered not to contact the victim or the victim’s immediate family member. If the victim requests not to be contacted by the defendant, such an order must be issued. The district attorney of the county that prosecuted the defendant may help facilitate communicating the victim’s request to CDCR. (Pen. Code, § 3053.6.)

3. Criminal Contempt

Disobedience of a court order may be punished as criminal contempt. 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 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.)

4. Effects of Restraining Orders

The consequences of having the court issue a restraining order against a person can be very severe. For example, the restraining order may prohibit the defendant from being within a certain distance of the person named in the order, thereby implicating the defendant’s right to travel. Depending on the facts, such an order may implicate an individual’s property interests by forcing him or her to vacate his or her own home. Such restrictions may negatively impact an individual’s successful reentry into the community and may lead increase a person’s likelihood to commit new crimes.

This bill expands the existing authority of the court to issue protective orders during sentencing of a defendant who has been convicted of felony offenses that require sex offender registration. Currently, the court may issue a protective order for up to ten years; this bill would authorize the

court to issue a protective order that is valid for the duration of time that the defendant is required to register as a sex offender which may last for a person's lifetime. (Pen. Code, § 290, effective Jan. 1, 2021.)

5. Constitutional Considerations

The expansion of current law to allow post-conviction restraining orders to last up the duration that a person is required to register as a sex offender raises several questions about the constitutionality of such an expansion. Such constitutional issues could include due process, cruel and unusual punishment, and equal protection. The Eighth Amendment prohibits the government from imposing cruel and unusual punishment. A cruel and unusual punishment claim could be raised when the punishment is disproportionate to the crime. The right to due process is found in the Fifth and Fourteenth Amendments and generally ensures that a defendant is treated fairly during criminal proceedings. The Equal Protection Clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." An equal protection challenge is a claim that a law discriminates against a person by unequal treatment or unequal results.

Generally, when a court sentences a defendant the court loses jurisdiction over the case. However, there are instances where the court retains limited jurisdiction for purposes such as adjudicating probation-related issues. In situations where a post-conviction protective order has been issued, the court retains limited jurisdiction to modify or terminate the order. If a court were to issue a protective order to last up to a defendant's life, would this also extend a court's jurisdiction over the defendant for life? The bill does not require the court to make any additional findings when issuing a post-conviction protective order for longer than the 10 years that is currently authorized. This may violate due process and the prohibition against cruel and unusual punishment.

Additionally, the ability of the court to place more severe restrictions on a person required to register as a sex offender compared to other types of offenders listed in subdivision (i) of Penal Code section 136.2 may raise equal protection issues.

6. Existing Restrictions on Sex Offenders

A person who commits an offense requiring registration on the sex offender registry may be required to register for life. (See Pen. Code, § 290 et seq., see note below on recent reforms to California's Sex Offender Registry.) The purpose of the registry was to create a "standardized, statewide system" and a "comprehensive system of risk assessment, supervision, monitoring and containment for registered sex offenders residing in California communities." (*People v. Nguyen* (2014) 222 Cal.App.4th 1168, 1179.) These statutes regulate numerous aspects of a sex offender's life including restricting the places a sex offender may live or visit, where they can work, and the people with whom they may interact. (*Ibid.*) A sex offender's identity and address is also subject to public disclosure.

Persons on the sex offender registry must register annually on their birthday (Pen. Code § 290.012), unless the person is transient, then they must register every month (Pen. Code, § 290.011). Failure to register is a separate offense with mandatory minimum jail times in either county jail or prison. (Pen. Code, § 290.018.)

Sex offenders released on parole are also required to be monitored through GPS (global positioning system) for life (Pen. Code, § 3000.07) and those deemed high risk, as determined by SARATSO (State Authorized Risk Assessment Tools for Sex Offenders), shall be required to participate in a sex offender management program as a condition of parole. (Pen. Code, § 3008).

Considering that sex offenders are so intensely monitored after release from incarceration and has a much lower recidivism rate than other convicted felons (4.8 percent over a five year period; http://saratso.org/pdf/ThePredictiveValidity_of_Static_99R_forSexualOffenders_inCalifornia_2016v1.pdf), is a post-conviction restraining order that could last decades after the person's conviction necessary?

7. Recent Reforms to California's Sex Offender Registry

California's sex offender registry was one of four states in the country that required lifetime registration for all registrants, regardless of the seriousness of the underlying offense. With over 100,000 people required to register as a sex offender as of 2017, California's local law enforcement agencies who are tasked with ensuring people register were spending 60-66% of their resources on managing this population and not able to focus on more high risk offenders.

SB 384 (Wiener), Ch. 541, Stats. 2017, made vast changes to the sex offender registry by establishing a tiered system based on seriousness of the offense and the offender's risk level. The lowest risk tier will have to register for a period of at least 10 years, the next tier will have to register for at least 20 years, and the last tier will have lifetime registration.

In order to be removed from the registry at the expiration of the required minimum registration period, an offender must petition the court to request termination from the registry. The petition must be served on the registering law enforcement agency and the district attorney of the county of conviction. If the district attorney requests a hearing, they are entitled to present evidence regarding whether community safety would be significantly enhanced by requiring continued registration. In determining whether to terminate registration, the court shall consider: the nature and facts of the registerable offense; the age and number of victims; whether any victim was a stranger at the time of the offense (known to the offender for less than 24 hours); criminal and relevant noncriminal behavior before and after conviction for the registerable offense; the time period during which the person has not reoffended; successful completion, if any, of a Sex Offender Management Board-certified sex offender treatment program; and the person's current risk of sexual or violent reoffense, including the person's risk levels on SARATSO (State Authorized Risk Assessment Tools for Sex Offenders) static, dynamic, and violence risk assessment instruments, if available.

The court must notify the Department of Justice (DOJ) when a petition is granted or denied. If the petition is denied, the court must also notify DOJ of when a person may repetition for termination from the registry, which shall be at least one year from the date of denial but not to exceed 5 years.

This bill contains a provision to delay its implementation until July 1, 2022 in order to allow DOJ to implement the changes from SB 384 prior to any new duties associated from the sex offender registry.

As a practical consideration, certain offenders are eligible for removal from the registry starting at 10 or 20 years but they there is no guarantee they will actually be granted removal. How will courts consider this when determining how long a person will actually be on the registry? Will the court presume the person will be on the registry only for the minimum length of time that their conviction calls for, or for life with the possibility of terminating the protective order early?

8. Argument in Support

Tulare County District Attorney's Office, the sponsor of this bill, writes in support:

Existing law requires a court with jurisdiction over a criminal matter to consider issuing a protective order, which may be valid for up to 10 years, in a case in which the defendant has been convicted of specified sex crimes, including rape, spousal rape, and crimes for which a person is required to registered as a sex offender. Under existing law, contempt of a court order is a misdemeanor, as specified.

When the perpetrator is released from prison, a protective order initiates and runs its course. After 10 years, the criminal court has no jurisdiction. For a survivor of sexual assault to seek an additional protective order, they must return to civil court, request a hearing, and face their perpetrator, which effectively means reliving their trauma.

For the past several years, California has empowered survivors of specified crimes to seek additional protection from the law. By giving the presiding judge an additional discretionary tool to extend a protective order, survivors can avoid reliving their trauma.

9. Argument in Opposition

According to California Attorneys for Criminal Justice:

SB 853 would drastically extend the duration of these protective orders for people convicted of any of the crimes which require sex offender registration under Penal Code § 290. This bill would permit a criminal protective order to extend as long as an offender must register as a sex offender without requiring judicial review. As you are no doubt aware, registration pursuant to Penal Code § 290 covers a wide variety of offenses, including misdemeanors involving no contact. Recently the legislature and recognize the overly broad category of these offenses and established a tiered length of registration that also ensures law enforcement resources are focused on the most problematic of offenses and offenders.

Currently registration can be required for 10 years, 20 years, or even for a lifetime. SB 853 would impose such expansive criminal protective orders decades after the underlying conviction without a judge reviewing whether there is any continuing basis or need for the order so many years later. Protective orders are very much intended to be fact-driven and based upon an existing concern. Empirical evidence suggests that a very small percentage of registrants

ever commit another offense, or even are more likely to harass, stalk, or further harm their victims especially a decade or more after their conviction date than any other type of offender. CACJ believes that judicial determination of whether an order should be extended is the most effective and appropriate approach.

Furthermore, civil restraining orders may be granted for up to five years, and the victim can seek to renew and extend the order after those five years if there is sufficient need. This is a fair and reasonable process which adequately protects the rights and interests of victims and convicted persons alike.

-- END --