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## Chapter 49: No Jail for Victims of Domestic Violence

*David Wiksell*

### *Code Section Affected*

Code of Civil Procedure § 1219 (amended).  
SB 1356 (Yee); 2008 STAT. Ch. 49.

### I. INTRODUCTION

In 2007, California law enforcement received 174,649 domestic violence calls.<sup>1</sup> Because domestic violence is one of “the most common yet least reported crimes in our nation,” the actual number of domestic violence incidents in 2007 was likely much higher.<sup>2</sup> Unfortunately, some domestic violence cases result in the victim’s incarceration.<sup>3</sup> When law enforcement intervenes and makes an arrest, a criminal trial against the perpetrator usually ensues.<sup>4</sup> In some cases, the domestic violence victim is called to testify at trial.<sup>5</sup> If the victim continually refuses to testify—a not too infrequent possibility—courts have the discretion to incarcerate the victim for contempt.<sup>6</sup>

Domestic violence victims incarcerated for refusing to testify are re-victimized by the very institutions responsible for protecting them.<sup>7</sup> Incarcerating the victim may also dissuade other victims from reporting these crimes.<sup>8</sup> As domestic violence is already an under-reported crime,<sup>9</sup> the harmful effects of incarceration most likely outweigh any positive gains.

Chapter 49 eliminates the court’s discretion to incarcerate a domestic violence victim for contempt when the victim refuses to testify concerning that

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1. SafeState, Domestic Violence: Facts, <http://safestate.org/index.cfm?navId=42> (last visited Jan. 28, 2009) (on file with the *McGeorge Law Review*).

2. A Safe Place: Lake County Crisis Center, Domestic Violence Frequently Asked Questions, <http://www.asafeplaceforhelp.org/domesticviolencefaqs.html#q1> (last visited July 1, 2008) [hereinafter Lake County Crisis Center] (on file with the *McGeorge Law Review*).

3. Abby Sewell, *Proposed Law Would Remove Threat of Jail from Domestic Violence Victims*, DESERT DISPATCH, June 17, 2008, [http://www.desertdispatch.com/news/victims\\_3616\\_article.html/domestic\\_violence.html](http://www.desertdispatch.com/news/victims_3616_article.html/domestic_violence.html) (on file with the *McGeorge Law Review*).

4. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1356, at M-O (Mar. 25, 2008) (explaining how arrest and prosecution rates for domestic violence have started to increase).

5. See *id.* at K-M (describing the difficulties that domestic violence victims face when called to testify).

6. See CAL. CIV. PROC. CODE § 1219(c) (West 2007) (stating that the court may require the victim to attend up to 72 hours of counseling programs or appropriate community service before resorting to incarceration for refusal to testify).

7. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1356, at 5 (June 10, 2008).

8. *Id.* at 4.

9. Lake County Crisis Center, *supra* note 2.

specific instance of domestic violence.<sup>10</sup> As a result, Chapter 49 ensures a victim's safety and well-being.<sup>11</sup>

## II. LEGAL BACKGROUND

Under existing law, judicial officers have the authority to compel testimony.<sup>12</sup> To enforce this power, a judicial officer may punish a non-compliant individual for civil contempt.<sup>13</sup> Aside from statutory authority, all courts have the inherent power to punish for contempt.<sup>14</sup>

Existing law enumerates specific acts or omissions that constitute contempt of court, including "refusing to be sworn or answer as a witness."<sup>15</sup> Existing law, subject to two exceptions, also provides that when the contempt consists of an omission to perform an act, such as the refusal to testify, the contemnor may be imprisoned until he or she has performed the act.<sup>16</sup>

The first exception to a court's contempt power prohibits any court from imprisoning victims of sexual assault "for contempt when the contempt consists of refusing to testify concerning that sexual assault."<sup>17</sup> The Legislature enacted this exception in 1984<sup>18</sup> due to the severity of the psychological and emotional harm that often results from sexual assault.<sup>19</sup>

The second exception, enacted in 1991,<sup>20</sup> refers to victims of domestic violence and provides that

[i]n a finding of contempt for a victim of domestic violence who refuses to testify, the court shall not incarcerate the victim, but may require the victim to attend up to 72 hours of a domestic violence program for victims or require the victim to perform up to 72 hours of appropriate

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10. CAL. CIV. PROC. CODE § 1219 (amended by Chapter 49).

11. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1356, at 3-4 (June 10, 2008) (describing how SB 1356 will allow victims, and not the court, to determine whether testifying will further jeopardize their safety).

12. CAL. CIV. PROC. CODE § 177 (West 2006).

13. *Id.* § 178.

14. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1356, at 5-6 (June 10, 2008); see also *Ex parte* Robinson, 86 U.S. 505, 510 (1874) ("The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts . . .").

15. CAL. CIV. PROC. CODE § 1209(a)(9) (West 2007).

16. See *id.* § 1219(a) (West 2007 & Supp. 2009) ("[W]hen the contempt consists of the omission to perform an act which is yet in the power of the person to perform, he or she may be imprisoned until he or she has performed it, and in that case the act shall be specified in the warrant of commitment.').

17. *Id.* § 1219(b).

18. SB 1678 (McCorquodale), 1984 STAT. CH. 1644.

19. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1356, at J (Mar. 25, 2008) (describing the special trauma resulting from sex crimes that may render victims fearful of the exposure involved in prosecuting the offender).

20. AB 363 (Nolan), 1991 STAT. CH. 866.

community service, provided that in a subsequent finding of contempt for refusing to testify arising out of the same case, the court shall have the option of incarceration.<sup>21</sup>

The impetus for this exception was the belief that a domestic violence victim would be “better served by being referred to a domestic violence shelter or community service” than by incarceration.<sup>22</sup> However, upon a second finding of contempt, the domestic violence victim may be incarcerated for up to five days.<sup>23</sup> To further protect domestic violence victims, the Legislature responded by enacting Chapter 49.

### III. CHAPTER 49

Chapter 49 eliminates a court’s discretion to imprison or otherwise confine a victim of domestic violence for contempt when the contempt consists of refusing to testify concerning that specific instance of domestic violence.<sup>24</sup> It mandates that victims of domestic violence be treated in the same manner as victims of sexual assault.<sup>25</sup>

### IV. ANALYSIS OF CHAPTER 49

#### A. *Arguments in Support*

Chapter 49’s support comes from at least forty-three different groups, including the California Partnership to End Domestic Violence and the California Public Defenders Association.<sup>26</sup> Most supporters stress that there already exists an exemption for sexual assault victims who refuse to testify concerning that sexual assault crime.<sup>27</sup> This exemption was created due to the severity of the crime and the psychological trauma and fear that sexual assault victims experience.<sup>28</sup> Chapter 49’s supporters argue that domestic violence victims

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21. CAL. CIV. PROC. CODE § 1219(c) (West 2007).

22. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1356, at K (Mar. 25, 2008).

23. CAL. CIV. PROC. CODE § 1218.

24. *Id.* § 1219 (amended by Chapter 49).

25. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1356, at 5 (June 10, 2008) (“[Chapter 49] will align protections for domestic violence victims with those for sexual assault victims by exempting domestic violence victims from being incarcerated when they are held in contempt for refusing to testify in court.”).

26. See SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1356, at 2-3 (Apr. 15, 2008) (listing the forty-three different groups in support of Chapter 49).

27. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1356, at 9 (June 10, 2008) (explaining the sexual assault victims’ exemption that was adopted in 1984).

28. See *id.* (“Current law provides this incarceration exemption to sexual assault victims due to the severity of the psychological and emotional harm that often results from this type of crime.”).

experience the same emotional harm and thus need the same protections.<sup>29</sup> They further argue that “domestic violence victims are also often victims of sexual [assault], but due to the intimate nature of the crime, [the sexual assault] often goes unreported as part of the cycle of abuse.”<sup>30</sup> Thus, supporters claim that it is critical to align the protections afforded to sexual assault victims with the protections afforded to domestic violence victims in California “by exempting domestic violence victims from being incarcerated when they are held in contempt for refusing to testify in court.”<sup>31</sup>

Supporters also stress that Chapter 49 “does not exempt a domestic violence victim from complying with a legally issued subpoena to testify, nor does it release the individual from going to court.”<sup>32</sup> Accordingly, “[c]ourts will still be able to find a victim of domestic violence in contempt, and fines can still be levied as a punishment.”<sup>33</sup>

Finally, supporters of Chapter 49 argue that incarcerating domestic violence victims for refusing to testify re-victimizes them by further compromising their safety and well-being.<sup>34</sup> Chapter 49 will eliminate this possibility of re-victimization and ensure protection for victims of domestic violence.<sup>35</sup>

### B. Arguments in Opposition

Chapter 49’s opponents, including the California District Attorneys Association, argue that the prior law needs no revision.<sup>36</sup> The opposition notes that the law already has exceptions for victims of domestic violence, including the initial requirement that the victim attend programs or counseling, and the fact that judges have discretion in mandating incarceration for the second offense.<sup>37</sup> The opposition further states that while incarceration after a contempt finding is

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29. *See id.* (discussing how domestic violence victims experience the same psychological trauma as sexual assault victims).

30. *Id.* at 5.

31. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1356, at 4 (Apr. 15, 2008).

32. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1356, at 4 (June 10, 2008).

33. *Id.*

34. *Id.* at 5, 8-9.

35. *Id.*

36. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1356, at 5 (Apr. 15, 2008) (noting that opposing parties include retired Superior Court Judge Quentin L. Kopp).

Code of Civil Procedure section 1219(c), enacted in 1984, contains a commonsensical compromise to the problem of a complaining victim of alleged domestic violence who refuses to testify after a law enforcement agency has responded to her/his complaint, investigated the allegation and referred the allegation to the county district attorney, who has, in turn, filed a complaint, conducted (in a felony case) a preliminary hearing, which then results in a court finding that probable cause exists to prosecute the defendant.

*Id.* (quoting Judge Quentin L. Kopp).

37. *See id.* (explaining the procedures under current law that the court must go through before incarcerating a domestic violence victim for contempt for refusing to testify).

rare, its threat remains a very powerful tool.<sup>38</sup> “The force of the law sends a clear message to abusive partners that the government is making the decision to pursue a criminal action and not the victim.”<sup>39</sup>

Opponents also argue that Chapter 49 not only condones a refusal to testify under oath (after expending valuable judicial resources on an oftentimes lengthy judicial proceeding), but it also renders courts powerless to enforce duly-issued orders and rulings.<sup>40</sup> According to the opposition, “[Chapter 49] constitutes a simplistic, inflexible policy which contradicts the 25-year or so history of effort by the legislature and judiciary to treat domestic violence in a serious manner as a serious crime.”<sup>41</sup> While opponents’ worries are legitimate, it is far more important to ensure that domestic violence victims will not be re-victimized through incarceration.

## V. CONCLUSION

Incarceration jeopardizes domestic violence victims’ safety and well-being.<sup>42</sup> Chapter 49 will not take away the court’s power to find a domestic violence victim in contempt.<sup>43</sup> However, Chapter 49 does eliminate the possibility of further endangering domestic violence victims through incarceration.<sup>44</sup> This law is a necessary step that places both domestic violence victims and sexual assault victims under the same protections, and ensures that neither will be re-victimized.<sup>45</sup>

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38. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1356, at Q (Mar. 25, 2008).

39. *Id.*

40. *Id.* at R.

41. *Id.*

42. *Id.* at H.

43. *Id.* at I.

44. *Id.*

45. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1356, at 5 (June 10, 2008) (“This legislation will align protections for domestic violence victims with those for sexual assault victims by exempting domestic violence victims from being incarcerated when they are held in contempt for refusing to testify in court.”); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1356, at H (Mar. 25, 2008) (describing how victims of domestic violence, when incarcerated, are re-victimized by the institutions that are charged to protect them).

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