

ASSEMBLY BILL

No. 1900

Introduced by Assembly Member Quirk

February 19, 2014

An act to amend Sections 1346, 1346.1, 1347, and 1347.5 of the Penal Code, relating to testimony.

LEGISLATIVE COUNSEL'S DIGEST

AB 1900, as introduced, Quirk. Victims of sex crimes: testimony: video-recording.

Existing law provides that when a defendant has been charged with certain sex crimes, including rape and sodomy, and the victim is a person 15 years of age or less or is developmentally disabled as a result of an intellectual disability, when the defendant has been charged with spousal rape or corporal injury resulting in a traumatic condition upon certain persons, or when the defendant is charged with certain sex crimes, including rape and sodomy, that are committed with or upon a person with a disability, the prosecution may apply for an order that the victim's testimony at the preliminary hearing be recorded and preserved on videotape.

Existing law authorizes the court in any criminal proceeding to order that the testimony of a minor 13 years of age or younger be taken by contemporaneous examination and cross-examination in another place, out of the presence of the judge, jury, defendant or defendants, and attorneys, and communicated to the courtroom by means of closed-circuit television. Existing law also requires the court, when the court makes that order, to order that a complete record of the examination of the minor be made and preserved on videotape.

This bill would allow a court to use any means of video-recording to comply with these recording and preservation requirements.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1346 of the Penal Code is amended to
2 read:

3 1346. (a) When a defendant has been charged with a violation
4 of Section 220, 243.4, 261, 261.5, 264.1, 273a, 273d, 285, 286,
5 288, 288a, 288.5, 289, or 647.6, and the victim either is a person
6 15 years of age or less or is developmentally disabled as a result
7 of an intellectual disability, as specified in subdivision (a) of
8 Section 4512 of the Welfare and Institutions Code, the people may
9 apply for an order that the victim’s testimony at the preliminary
10 hearing, in addition to being stenographically recorded, be ~~recorded~~
11 ~~video-recorded and preserved on videotape.~~ *the video-recording*
12 *preserved.*

13 (b) The application for the order shall be in writing and made
14 three days prior to the preliminary hearing.

15 (c) Upon timely receipt of the application, the magistrate shall
16 order that the testimony of the victim given at the preliminary
17 hearing be taken and preserved ~~on videotape.~~ *as a video-recording.*
18 ~~The videotape video-recording~~ shall be transmitted to the clerk of
19 the court in which the action is pending.

20 (d) If at the time of trial the court finds that further testimony
21 would cause the victim emotional trauma so that the victim is
22 medically unavailable or otherwise unavailable within the meaning
23 of Section 240 of the Evidence Code, the court may admit the
24 ~~videotape video-recording~~ of the victim’s testimony at the
25 preliminary hearing as former testimony under Section 1291 of
26 the Evidence Code.

27 (e) A ~~videotape video-recording~~ that is taken pursuant to this
28 section is subject to a protective order of the court for the purpose
29 of protecting the privacy of the victim. This subdivision does not
30 affect the provisions of subdivision (b) of Section 868.7.

31 (f) A ~~videotape video-recording~~ made pursuant to this section
32 shall be made available to the prosecuting attorney, the defendant,
33 and his or her attorney for viewing during ordinary business hours.

1 ~~A videotape~~ *video-recording* that is made available pursuant to
2 this section is subject to a protective order of the court for the
3 purpose of protecting the privacy of the victim.

4 (g) ~~The tape~~ *video-recording* shall be destroyed after five years
5 have elapsed from the date of entry of judgment, except that if an
6 appeal is filed, ~~the tape~~ *video-recording* shall not be destroyed
7 until a final judgment on appeal has been rendered.

8 SEC. 2. Section 1346.1 of the Penal Code is amended to read:

9 1346.1. (a) When a defendant has been charged with a violation
10 of Section 262 or subdivision (a) of Section 273.5, the people may
11 apply for an order that the victim's testimony at the preliminary
12 hearing, in addition to being stenographically recorded, ~~be recorded~~
13 *video-recorded* and ~~preserved on videotape~~; *the video-recording*
14 *preserved*.

15 (b) The application for the order shall be in writing and made
16 three days prior to the preliminary hearing.

17 (c) Upon timely receipt of the application, the magistrate shall
18 order that the testimony of the victim given at the preliminary
19 hearing be taken and ~~preserved on videotape~~; *as a video-recording*.
20 ~~The videotape video-recording~~ shall be transmitted to the clerk of
21 the court in which the action is pending.

22 (d) If the victim's prior testimony given at the preliminary
23 hearing is admissible pursuant to the Evidence Code, then the
24 ~~videotape recording~~ *video-recording* of that testimony may be
25 introduced as evidence at trial.

26 SEC. 3. Section 1347 of the Penal Code is amended to read:

27 1347. (a) It is the intent of the Legislature in enacting this
28 section to provide the court with discretion to employ alternative
29 court procedures to protect the rights of a child witness, the rights
30 of the defendant, and the integrity of the judicial process. In
31 exercising its discretion, the court necessarily will be required to
32 balance the rights of the defendant or defendants against the need
33 to protect a child witness and to preserve the integrity of the court's
34 truthfinding function. This discretion is intended to be used
35 selectively when the facts and circumstances in the individual case
36 present compelling evidence of the need to use these alternative
37 procedures.

38 (b) Notwithstanding any other law, the court in any criminal
39 proceeding, upon written notice by the prosecutor made at least
40 three days prior to the date of the preliminary hearing or trial date

1 on which the testimony of the minor is scheduled, or during the
2 course of the proceeding on the court's own motion, may order
3 that the testimony of a minor 13 years of age or younger at the
4 time of the motion be taken by contemporaneous examination and
5 cross-examination in another place and out of the presence of the
6 judge, jury, defendant or defendants, and attorneys, and
7 communicated to the courtroom by means of closed-circuit
8 television, if the court makes all of the following findings:

9 (1) The minor's testimony will involve a recitation of the facts
10 of any of the following:

11 (A) An alleged sexual offense committed on or with the minor.

12 (B) An alleged violent felony, as defined in subdivision (c) of
13 Section 667.5, of which the minor is a victim.

14 (C) An alleged felony offense specified in Section 273a or 273d
15 of which the minor is a victim.

16 (2) The impact on the minor of one or more of the factors
17 enumerated in subparagraphs (A) to (E), inclusive, is shown by
18 clear and convincing evidence to be so substantial as to make the
19 minor unavailable as a witness unless closed-circuit testimony is
20 used.

21 (A) Testimony by the minor in the presence of the defendant
22 would result in the child suffering serious emotional distress so
23 that the child would be unavailable as a witness.

24 (B) The defendant used a deadly weapon in the commission of
25 the offense.

26 (C) The defendant threatened serious bodily injury to the child
27 or the child's family, threatened incarceration or deportation of
28 the child or a member of the child's family, threatened removal
29 of the child from the child's family, or threatened the dissolution
30 of the child's family in order to prevent or dissuade the minor from
31 attending or giving testimony at any trial or court proceeding, or
32 to prevent the minor from reporting the alleged sexual offense, or
33 from assisting in criminal prosecution.

34 (D) The defendant inflicted great bodily injury upon the child
35 in the commission of the offense.

36 (E) The defendant or his or her counsel behaved during the
37 hearing or trial in a way that caused the minor to be unable to
38 continue his or her testimony.

39 In making the determination required by this section, the court
40 shall consider the age of the minor, the relationship between the

1 minor and the defendant or defendants, any handicap or disability
2 of the minor, and the nature of the acts charged. The minor's refusal
3 to testify shall not alone constitute sufficient evidence that the
4 special procedure described in this section is necessary to obtain
5 the minor's testimony.

6 (3) The equipment available for use of closed-circuit television
7 would accurately communicate the image and demeanor of the
8 minor to the judge, jury, defendant or defendants, and attorneys.

9 (c) If the court orders the use of closed-circuit television,
10 two-way closed-circuit television shall be used, except that if the
11 impact on the minor of one or more of the factors enumerated in
12 subparagraphs (A) to (E), inclusive, of paragraph (2) of subdivision
13 (b), is shown by clear and convincing evidence to be so substantial
14 as to make the minor unavailable as a witness even if two-way
15 closed-circuit television is used, one-way closed-circuit television
16 may be used. The prosecution shall give the defendant or
17 defendants at least 30 days' written notice of the prosecution's
18 intent to seek the use of one-way closed-circuit television, unless
19 good cause is shown to the court why this 30-day notice
20 requirement should not apply.

21 (d) (1) The hearing on a motion brought pursuant to this section
22 shall be conducted out of the presence of the jury.

23 (2) Notwithstanding Section 804 of the Evidence Code or any
24 other law, the court, in determining the merits of the motion, shall
25 not compel the minor to testify at the hearing; nor shall the court
26 deny the motion on the ground that the minor has not testified.

27 (3) In determining whether the impact on an individual child of
28 one or more of the five factors enumerated in paragraph (2) of
29 subdivision (b) is so substantial that the minor is unavailable as a
30 witness unless two-way or one-way closed-circuit television is
31 used, the court may question the minor in chambers, or at some
32 other comfortable place other than the courtroom, on the record
33 for a reasonable period of time with the support person, the
34 prosecutor, and defense counsel present. The defendant or
35 defendants shall not be present. The court shall conduct the
36 questioning of the minor and shall not permit the prosecutor or
37 defense counsel to examine the minor. The prosecutor and defense
38 counsel shall be permitted to submit proposed questions to the
39 court prior to the session in chambers. Defense counsel shall be

1 afforded a reasonable opportunity to consult with the defendant
2 or defendants prior to the conclusion of the session in chambers.

3 (e) When the court orders the testimony of a minor to be taken
4 in another place outside of the courtroom, the court shall do all of
5 the following:

6 (1) Make a brief statement on the record, outside of the presence
7 of the jury, of the reasons in support of its order. While the
8 statement need not include traditional findings of fact, the reasons
9 shall be set forth with sufficient specificity to permit meaningful
10 review and to demonstrate that discretion was exercised in a
11 careful, reasonable, and equitable manner.

12 (2) Instruct the members of the jury that they are to draw no
13 inferences from the use of closed-circuit television as a means of
14 facilitating the testimony of the minor.

15 (3) Instruct respective counsel, outside of the presence of the
16 jury, that they are to make no comment during the course of the
17 trial on the use of closed-circuit television procedures.

18 (4) Instruct the support witness, outside of the presence of the
19 jury, that he or she is not to coach, cue, or in any way influence
20 or attempt to influence the testimony of the minor.

21 (5) Order that a complete record of the examination of the minor,
22 including the images and voices of all persons who in any way
23 participate in the examination, be made and preserved ~~on videotape~~
24 *as a video-recording* in addition to being stenographically recorded.
25 ~~The videotape video-recording~~ shall be transmitted to the clerk of
26 the court in which the action is pending and shall be made available
27 for viewing to the prosecuting attorney, the defendant or
28 defendants, and his or her attorney during ordinary business hours.
29 ~~The videotape video-recording~~ shall be destroyed after five years
30 have elapsed from the date of entry of judgment. If an appeal is
31 filed, ~~the tape video-recording~~ shall not be destroyed until a final
32 judgment on appeal has been ordered. ~~Any videotape~~ A
33 *video-recording* that is taken pursuant to this section is subject to
34 a protective order of the court for the purpose of protecting the
35 privacy of the witness. This subdivision does not affect the
36 provisions of subdivision (b) of Section 868.7.

37 (f) When the court orders the testimony of a minor to be taken
38 in another place outside the courtroom, only the minor, a support
39 person designated pursuant to Section 868.5, a nonuniformed bailiff
40 any technicians necessary to operate the closed-circuit equipment,

1 and, after consultation with the prosecution and the defense, a
2 representative appointed by the court, shall be physically present
3 for the testimony. A ~~videotape~~ *video-recording device* shall record
4 the image of the minor and his or her testimony, and a separate
5 ~~videotape~~ *video-recording device* shall record the image of the
6 support person.

7 (g) When the court orders the testimony of a minor to be taken
8 in another place outside the courtroom, the minor shall be brought
9 into the judge's chambers prior to the taking of his or her testimony
10 to meet for a reasonable period of time with the judge, the
11 prosecutor, and defense counsel. A support person for the minor
12 shall also be present. This meeting shall be for the purpose of
13 explaining the court process to the child and to allow the attorneys
14 an opportunity to establish rapport with the child to facilitate later
15 questioning by closed-circuit television. No participant shall discuss
16 the defendant or defendants or any of the facts of the case with the
17 minor during this meeting.

18 (h) When the court orders the testimony of a minor to be taken
19 in another place outside the courtroom, nothing in this section
20 prohibits the court from ordering the minor to be brought into the
21 courtroom for a limited purpose, including the identification of
22 the defendant or defendants as the court deems necessary.

23 (i) The examination shall be under oath, and the defendant or
24 defendants shall be able to see and hear the minor witness, and if
25 two-way closed-circuit television is used, the defendant's image
26 shall be transmitted live to the witness.

27 (j) Nothing in this section affects the disqualification of
28 witnesses pursuant to Section 701 of the Evidence Code.

29 (k) The cost of examination by contemporaneous closed-circuit
30 television ordered pursuant to this section shall be borne by the
31 court out of its existing budget.

32 (l) Nothing in this section shall be construed to prohibit a
33 defendant from being represented by counsel during any
34 closed-circuit testimony.

35 SEC. 4. Section 1347.5 of the Penal Code is amended to read:

36 1347.5. (a) It is the intent of the Legislature, in enacting this
37 section, to provide the court with discretion to modify court
38 procedures, as a reasonable accommodation, to assure that adults
39 and children with disabilities who have been victims of an alleged
40 sexual or otherwise specified offense are able to participate

1 effectively in criminal proceedings. In exercising its discretion,
2 the court shall balance the rights of the defendant against the right
3 of the victim who has a disability to full access and participation
4 in the proceedings, while preserving the integrity of the court's
5 truthfinding function.

6 (1) For purposes of this section, the term "disability" is defined
7 in paragraphs (1) and (2) of subdivision (c) of Section 11135 of
8 the Government Code.

9 (2) The right of the victim is not to confront the perpetrator, but
10 derives under both Section 504 of the Rehabilitation Act of 1973
11 (29 U.S.C. Sec. 794) and the Americans with Disabilities Act of
12 1990 (42 U.S.C. Sec. 12101 ~~and following~~ *et. seq.*) as a right to
13 participate in or benefit from the same services or services that are
14 equal or as effective as those enjoyed by persons without
15 disabilities.

16 (b) Notwithstanding any other law, in any criminal proceeding
17 in which the defendant is charged with a violation of Section 220,
18 243.4, 261, 261.5, 264.1, 273a, 273d, 285, 286, 288, 288a, 288.5,
19 or 289, subdivision (1) of Section 314, Section 368, 647.6, or with
20 any attempt to commit a crime listed in this subdivision, committed
21 with or upon a person with a disability, the court in its discretion
22 may make accommodations to support the person with a disability,
23 including, but not limited to, any of the following:

24 (1) Allow the person with a disability reasonable periods of
25 relief from examination and cross-examination during which he
26 or she may retire from the courtroom. The judge may also allow
27 other witnesses in the proceeding to be examined when the person
28 with a disability retires from the courtroom.

29 (2) Allow the person with a disability to utilize a support person
30 pursuant to Section 868.5 or a regional center representative
31 providing services to a developmentally disabled individual
32 pursuant to Article 1 (commencing with Section 4620) or Article
33 2 (commencing with Section 4640) of Chapter 5 of Division 4.5
34 of the Welfare and Institutions Code. In addition to, or instead of,
35 allowing the person with a disability to utilize a support person or
36 regional center representative pursuant to this paragraph, the court
37 may allow the person with a disability to utilize a person necessary
38 to facilitate the communication or physical needs of the person
39 with a disability.

1 (3) Notwithstanding Section ~~68119~~ 68110 of the Government
2 Code, the judge may remove his or her robe if the judge believes
3 that this formal attire prevents full participation of the person with
4 a disability because it is intimidating to him or her.

5 (4) The judge, parties, witnesses, support persons, and court
6 personnel may be relocated within the courtroom to facilitate a
7 more comfortable and personal environment for the person with
8 a disability as well as accommodating any specific requirements
9 for communication by that person.

10 (c) The prosecutor may apply for an order that the testimony of
11 the person with a disability at the preliminary hearing, in addition
12 to being stenographically recorded, be ~~recorded~~ *video-recorded*
13 and ~~preserved on videotape~~. *the video-recording preserved.*

14 (1) The application for the order shall be in writing and made
15 three days prior to the preliminary hearing.

16 (2) Upon timely receipt of the application, the judge shall order
17 that the testimony of the person with a disability given at the
18 preliminary hearing be taken and preserved ~~on videotape~~. *as a*
19 *video-recording*. The ~~videotape~~ *video-recording* shall be
20 transmitted to the clerk of the court in which the action is pending.

21 (3) If at the time of trial the court finds that further testimony
22 would cause the person with a disability emotional trauma so that
23 he or she is medically unavailable or otherwise unavailable within
24 the meaning of Section 240 of the Evidence Code, the court may
25 admit the ~~videotape~~ *video-recording* of his or her testimony at the
26 preliminary hearing as former testimony under Section 1291 of
27 the Evidence Code.

28 (4) ~~Any videotape~~ *A video-recording* that is taken pursuant to
29 this subdivision is subject to a protective order of the court for the
30 purpose of protecting the privacy of the person with a disability.
31 This subdivision does not affect the provisions of subdivision (b)
32 of Section 868.7.

33 (d) Notwithstanding any other law, the court in any criminal
34 proceeding, upon written notice of the prosecutor made at least
35 three days prior to the date of the preliminary hearing or trial date
36 on which the testimony of the person with a disability is scheduled,
37 or during the course of the proceeding on the court's own motion,
38 may order that the testimony of the person with a disability be
39 taken by contemporaneous examination and cross-examination in
40 another place and out of the presence of the judge, jury, and

1 defendant, and communicated to the courtroom by means of
2 two-way closed-circuit television, if the court makes all of the
3 following findings:

4 (1) The person with a disability will be called on to testify
5 concerning facts of an alleged sexual offense, or other crime as
6 specified in subdivision (b), committed on or with that person.

7 (2) The impact on the person with a disability of one or more
8 of the factors enumerated in subparagraphs (A) to (D), inclusive,
9 is shown by clear and convincing evidence to be so substantial as
10 to make the person with a disability unavailable as a witness unless
11 closed-circuit television is used. The refusal of the person with a
12 disability to testify shall not alone constitute sufficient evidence
13 that the special procedure described in this subdivision is necessary
14 in order to accommodate the disability. The court may take into
15 consideration the relationship between the person with a disability
16 and the defendant or defendants.

17 (A) Threats of serious bodily injury to be inflicted on the person
18 with a disability or a family member, of incarceration,
19 institutionalization, or deportation of the person with a disability
20 or a family member, or of removal of the person with a disability
21 from his or her residence by withholding needed services when
22 the threats come from a service provider, in order to prevent or
23 dissuade the person with a disability from attending or giving
24 testimony at any trial or court proceeding or to prevent that person
25 from reporting the alleged offense or from assisting in criminal
26 prosecution.

27 (B) Use of a firearm or any other deadly weapon during the
28 commission of the crime.

29 (C) Infliction of great bodily injury upon the person with a
30 disability during the commission of the crime.

31 (D) Conduct on the part of the defendant or defense counsel
32 during the hearing or trial that causes the person with a disability
33 to be unable to continue his or her testimony.

34 (e) (1) The hearing on the motion brought pursuant to this
35 subdivision shall be conducted out of the presence of the jury.

36 (2) Notwithstanding Section 804 of the Evidence Code or any
37 other law, the court, in determining the merits of the motion, shall
38 not compel the person with a disability to testify at the hearing;
39 nor shall the court deny the motion on the ground that the person
40 with a disability has not testified.

1 (3) In determining whether the impact on an individual person
2 with a disability of one or more of the factors enumerated under
3 paragraph (2) of subdivision (d) is so substantial that the person
4 is unavailable as a witness unless the closed-circuit television
5 procedure is employed, the court may question the person with a
6 disability in chambers, or at some other comfortable place other
7 than the courtroom, on the record for a reasonable period of time
8 with the support person described under paragraph (2) of
9 subdivision (b), the prosecutor, and defense counsel present. At
10 this time the court shall explain the process to the person with a
11 disability. The defendant or defendants shall not be present;
12 however, the defendant or defendants shall have the opportunity
13 to contemporaneously observe the proceedings by closed-circuit
14 television. Defense counsel shall be afforded a reasonable
15 opportunity to consult with the defendant or defendants prior to
16 the conclusion of the session in chambers.

17 (f) When the court orders the testimony of a victim who is a
18 person with a disability to be taken in another place outside of the
19 courtroom, the court shall do all of the following:

20 (1) Make a brief statement on the record, outside of the presence
21 of the jury, of the reasons in support of its order. While the
22 statement need not include traditional findings of fact, the reasons
23 shall be set forth with sufficient specificity to permit meaningful
24 review and to demonstrate that discretion was exercised in a
25 careful, reasonable, and equitable manner.

26 (2) Instruct the members of the jury that they are to draw no
27 inferences from the use of closed-circuit television as a means of
28 assuring the full participation of the victim who is a person with
29 a disability by accommodating that individual's disability.

30 (3) Instruct respective counsel, outside of the presence of the
31 jury, that they are to make no comment during the course of the
32 trial on the use of closed-circuit television procedures.

33 (4) Instruct the support person, if the person is part of the court's
34 accommodation of the disability, outside of the presence of the
35 jury, that he or she is not to coach, cue, or in any way influence
36 or attempt to influence the testimony of the person with a disability.

37 (5) Order that a complete record of the examination of the person
38 with a disability, including the images and voices of all persons
39 who in any way participate in the examination, be made and
40 preserved ~~on videotape~~ as a *video-recording* in addition to being

1 stenographically recorded. The ~~videotape~~ *video-recording* shall
 2 be transmitted to the clerk of the court in which the action is
 3 pending and shall be made available for viewing to the prosecuting
 4 attorney, the defendant, and his or her attorney, during ordinary
 5 business hours. The ~~videotape~~ *video-recording* shall be destroyed
 6 after five years have elapsed from the date of entry of judgment.
 7 If an appeal is filed, the ~~tape~~ *video-recording* shall not be destroyed
 8 until a final judgment on appeal has been ordered. ~~Any videotape~~
 9 *A video-recording* that is taken pursuant to this section is subject
 10 to a protective order of the court for the purpose of protecting the
 11 privacy of the person with a disability. This subdivision does not
 12 affect the provisions of subdivision (b) of Section 868.7.

13 (g) When the court orders the testimony of a victim who is a
 14 person with a disability to be taken in another place outside the
 15 courtroom, nothing in this section shall prohibit the court from
 16 ordering the victim to appear in the courtroom for a limited
 17 purpose, including the identification of the defendant or defendants
 18 as the court deems necessary.

19 (h) The examination shall be under oath, and the defendant shall
 20 be able to see and hear the person with a disability. If two-way
 21 closed-circuit television is used, the defendant’s image shall be
 22 transmitted live to the person with a disability.

23 (i) Nothing in this section shall affect the disqualification of
 24 witnesses pursuant to Section 701 of the Evidence Code.

25 (j) The cost of examination by contemporaneous closed-circuit
 26 television ordered pursuant to this section shall be borne by the
 27 court out of its existing budget.

28 (k) This section shall not be construed to obviate the need to
 29 provide other accommodations necessary to ensure accessibility
 30 of courtrooms to persons with disabilities nor prescribe a lesser
 31 standard of accessibility or usability for persons with disabilities
 32 than that provided by Title II of the Americans with Disabilities
 33 Act of 1990 (42 U.S.C. Sec. 12101 ~~and following~~ *et. seq.*) and
 34 federal regulations adopted pursuant to that act.

35 (l) The Judicial Council shall report to the Legislature, no later
 36 than two years after the enactment of this subdivision, on the
 37 frequency of the use and effectiveness of admitting the videotape
 38 of testimony by means of closed-circuit television.

O