

AMENDED IN ASSEMBLY MARCH 27, 2014

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

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 amended, Quirk. Victims of sex crimes: testimony: ~~video-recording~~; *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~~ *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
11 ~~video-recorded~~ *video recorded* and the ~~video-recording~~ *video*
12 *recording* 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 as a ~~video-recording~~ *video*
18 *recording, in addition to being stenographically recorded.* The
19 ~~video-recording~~ *video recording* shall be transmitted to the clerk
20 of the court in which the action is pending.

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

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

1 (f) A ~~video-recording~~ *video recording* made pursuant to this
2 section shall be made available to the prosecuting attorney, the
3 defendant, and his or her attorney for viewing during ordinary
4 business hours. A ~~video-recording~~ *video recording* that is made
5 available pursuant to this section is subject to a protective order
6 of the court for the purpose of protecting the privacy of the victim.

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

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

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

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

21 (c) Upon timely receipt of the application, the magistrate shall
22 order that the testimony of the victim given at the preliminary
23 hearing be taken and preserved as a ~~video-recording~~ *video*
24 *recording, in addition to being stenographically recorded.* The
25 ~~video-recording~~ *video recording* shall be transmitted to the clerk
26 of the court in which the action is pending.

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

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

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

1 present compelling evidence of the need to use these alternative
2 procedures.

3 (b) Notwithstanding any other law, the court in any criminal
4 proceeding, upon written notice by the prosecutor made at least
5 three days prior to the date of the preliminary hearing or trial date
6 on which the testimony of the minor is scheduled, or during the
7 course of the proceeding on the court’s own motion, may order
8 that the testimony of a minor 13 years of age or younger at the
9 time of the motion be taken by contemporaneous examination and
10 cross-examination in another place and out of the presence of the
11 judge, jury, defendant or defendants, and attorneys, and
12 communicated to the courtroom by means of closed-circuit
13 television, if the court makes all of the following findings:

14 (1) The minor’s testimony will involve a recitation of the facts
15 of any of the following:

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

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

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

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

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

29 (B) The defendant used a deadly weapon in the commission of
30 the offense.

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

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

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

4 In making the determination required by this section, the court
5 shall consider the age of the minor, the relationship between the
6 minor and the defendant or defendants, any handicap or disability
7 of the minor, and the nature of the acts charged. The minor's refusal
8 to testify shall not alone constitute sufficient evidence that the
9 special procedure described in this section is necessary to obtain
10 the minor's testimony.

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

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

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

28 (2) Notwithstanding Section 804 of the Evidence Code or any
29 other law, the court, in determining the merits of the motion, shall
30 not compel the minor to testify at the ~~hearing~~; *hearing*, nor shall
31 the court deny the motion on the ground that the minor has not
32 testified.

33 (3) In determining whether the impact on an individual child of
34 one or more of the five factors enumerated in paragraph (2) of
35 subdivision (b) is so substantial that the minor is unavailable as a
36 witness unless two-way or one-way closed-circuit television is
37 used, the court may question the minor in chambers, or at some
38 other comfortable place other than the courtroom, on the record
39 for a reasonable period of time with the support person, the
40 prosecutor, and defense counsel present. The defendant or

1 defendants shall not be present. The court shall conduct the
2 questioning of the minor and shall not permit the prosecutor or
3 defense counsel to examine the minor. The prosecutor and defense
4 counsel shall be permitted to submit proposed questions to the
5 court prior to the session in chambers. Defense counsel shall be
6 afforded a reasonable opportunity to consult with the defendant
7 or defendants prior to the conclusion of the session in chambers.

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

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

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

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

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

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

1 subdivision does not affect the provisions of subdivision (b) of
2 Section 868.7.

3 (f) When the court orders the testimony of a minor to be taken
4 in another place outside the courtroom, only the minor, a support
5 person designated pursuant to Section 868.5, a nonuniformed ~~bailiff~~
6 *bailiff*, any technicians necessary to operate the closed-circuit
7 equipment, and, after consultation with the prosecution and the
8 defense, a representative appointed by the court, shall be physically
9 present for the testimony. A ~~video-recording~~ *video recording*
10 device shall record the image of the minor and his or her testimony,
11 and a separate ~~video-recording~~ *video recording* device shall record
12 the image of the support person.

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

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

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

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

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

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

1 SEC. 4. Section 1347.5 of the Penal Code is amended to read:
 2 1347.5. (a) It is the intent of the Legislature, in enacting this
 3 section, to provide the court with discretion to modify court
 4 procedures, as a reasonable accommodation, to ~~assure~~ *ensure* that
 5 adults and children with disabilities who have been victims of an
 6 alleged sexual or otherwise specified offense are able to participate
 7 effectively in criminal proceedings. In exercising its discretion,
 8 the court shall balance the rights of the defendant against the right
 9 of the victim who has a disability to full access and participation
 10 in the proceedings, while preserving the integrity of the court's
 11 truthfinding function.

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

15 (2) The right of the victim is not to confront the perpetrator, but
 16 derives under both Section 504 of the Rehabilitation Act of 1973
 17 (29 U.S.C. Sec. 794) and the Americans with Disabilities Act of
 18 1990 (42 U.S.C. Sec. 12101 et seq.) as a right to participate in or
 19 benefit from the same services or services that are equal or as
 20 effective as those enjoyed by persons without disabilities.

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

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

34 (2) Allow the person with a disability to utilize a support person
 35 pursuant to Section 868.5 or a regional center representative
 36 providing services to a developmentally disabled individual
 37 pursuant to Article 1 (commencing with Section 4620) or Article
 38 2 (commencing with Section 4640) of Chapter 5 of Division 4.5
 39 of the Welfare and Institutions Code. In addition to, or instead of,
 40 allowing the person with a disability to utilize a support person or

1 regional center representative pursuant to this paragraph, the court
2 may allow the person with a disability to utilize a person necessary
3 to facilitate the communication or physical needs of the person
4 with a disability.

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

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

14 (c) The prosecutor may apply for an order that the testimony of
15 the person with a disability at the preliminary hearing, in addition
16 to being stenographically recorded, be ~~video-recorded~~ *video*
17 *recorded* and the ~~video-recording~~ *video recording* preserved.

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

20 (2) Upon timely receipt of the application, the judge shall order
21 that the testimony of the person with a disability given at the
22 preliminary hearing be taken and preserved as a ~~video-recording~~
23 *video recording, in addition to being stenographically recorded.*
24 The ~~video-recording~~ *video recording* shall be transmitted to the
25 clerk of the court in which the action is pending.

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

33 (4) A ~~video-recording~~ *video recording* that is taken pursuant to
34 this subdivision is subject to a protective order of the court for the
35 purpose of protecting the privacy of the person with a disability.
36 This subdivision does not affect the provisions of subdivision (b)
37 of Section 868.7.

38 (d) Notwithstanding any other law, the court in any criminal
39 proceeding, upon written notice of 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 person with a disability is scheduled,
2 or during the course of the proceeding on the court's own motion,
3 may order that the testimony of the person with a disability be
4 taken by contemporaneous examination and cross-examination in
5 another place and out of the presence of the judge, jury, and
6 defendant, and communicated to the courtroom by means of
7 two-way closed-circuit television, if the court makes all of the
8 following findings:

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

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

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

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

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

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

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

1 (2) Notwithstanding Section 804 of the Evidence Code or any
2 other law, the court, in determining the merits of the motion, shall
3 not compel the person with a disability to testify at the ~~hearing~~;
4 *hearing*, nor shall the court deny the motion on the ground that
5 the person with a disability has not testified.

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

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

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

31 (2) Instruct the members of the jury that they are to draw no
32 inferences from the use of closed-circuit television as a means of
33 ~~assuring~~ *ensuring* the full participation of the victim who is a
34 person with a disability by accommodating that individual's
35 disability.

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

39 (4) Instruct the support person, if the person is part of the court's
40 accommodation of the disability, outside of the presence of the

1 jury, that he or she is not to coach, cue, or in any way influence
2 or attempt to influence the testimony of the person with a disability.

3 (5) Order that a complete record of the examination of the person
4 with a disability, including the images and voices of all persons
5 who in any way participate in the examination, be made and
6 preserved as a ~~video-recording~~ *video recording* in addition to being
7 stenographically recorded. The ~~video-recording~~ *video recording*
8 shall be transmitted to the clerk of the court in which the action is
9 pending and shall be made available for viewing to the prosecuting
10 attorney, the defendant, and his or her attorney, during ordinary
11 business hours. The ~~video-recording~~ *video recording* shall be
12 destroyed after five years have elapsed from the date of entry of
13 judgment. If an appeal is filed, the ~~video-recording~~ *video recording*
14 shall not be destroyed until a final judgment on appeal has been
15 ordered. A ~~video-recording~~ *video recording* that is taken pursuant
16 to this section is subject to a protective order of the court for the
17 purpose of protecting the privacy of the person with a disability.
18 This subdivision does not affect the provisions of subdivision (b)
19 of Section 868.7.

20 (g) When the court orders the testimony of a victim who is a
21 person with a disability to be taken in another place outside the
22 courtroom, nothing in this section shall prohibit the court from
23 ordering the victim to appear in the courtroom for a limited
24 purpose, including the identification of the defendant or defendants
25 as the court deems necessary.

26 (h) The examination shall be under oath, and the defendant shall
27 be able to see and hear the person with a disability. If two-way
28 closed-circuit television is used, the defendant's image shall be
29 transmitted live to the person with a disability.

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

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

35 (k) This section shall not be construed to obviate the need to
36 provide other accommodations necessary to ensure accessibility
37 of courtrooms to persons with disabilities nor prescribe a lesser
38 standard of accessibility or usability for persons with disabilities
39 than that provided by Title II of the Americans with Disabilities

1 Act of 1990 (42 U.S.C. Sec. 12101 et seq.) and federal regulations
2 adopted pursuant to that act.
3 (l) The Judicial Council shall report to the Legislature, no later
4 than two years after the enactment of this subdivision, on the
5 frequency of the use and effectiveness of admitting the videotape
6 of testimony by means of closed-circuit television.

O