

AMENDED IN ASSEMBLY MARCH 26, 2015

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1276**

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**Introduced by Assembly Member Santiago**

February 27, 2015

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An act to amend Section ~~261~~ 1347 of the Penal Code, relating to ~~sexual assault~~ *criminal procedure*.

LEGISLATIVE COUNSEL'S DIGEST

AB 1276, as amended, Santiago. ~~Sexual assault.~~ *Child witnesses: human trafficking.*

*Existing law authorizes a court in a criminal proceeding, upon written notice by the prosecutor made at least 3 days prior to the date of the preliminary hearing or trial date on which the testimony of the minor is scheduled or during the course of the proceeding on the court's own motion, to order that the testimony of a minor 13 years of age or younger at the time of the motion be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant or defendants, and attorneys, and communicated to the courtroom by means of closed-circuit television, if the court makes specified findings. One of the findings required by existing law requires is that the minor's testimony will involve a recitation of the facts of specified crimes, including an alleged violent felony of which the minor is a victim.*

*This bill would authorize a minor 17 years of age or younger to testify by contemporaneous examination and cross-examination if the testimony will involve the recitation of the facts of an alleged offense of human trafficking.*

~~Existing law establishes various sexual assault offenses, including the offense of rape. Under existing law, rape is defined as an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, under certain circumstances, including where the act is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.~~

~~This bill would make technical, nonsubstantive changes to the these provisions:~~

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

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

1     SECTION 1. Section 1347 of the Penal Code is amended to  
2 read:

3     1347. (a) It is the intent of the Legislature in enacting this  
4 section to provide the court with discretion to employ alternative  
5 court procedures to protect the rights of a child witness, the rights  
6 of the defendant, and the integrity of the judicial process. In  
7 exercising its discretion, the court necessarily will be required to  
8 balance the rights of the defendant or defendants against the need  
9 to protect a child witness and to preserve the integrity of the court's  
10 truthfinding function. This discretion is intended to be used  
11 selectively when the facts and circumstances in the individual case  
12 present compelling evidence of the need to use these alternative  
13 procedures.

14     (b) Notwithstanding any other law, the court in any criminal  
15 proceeding, upon written notice by the prosecutor made at least  
16 three days prior to the date of the preliminary hearing or trial date  
17 on which the testimony of the minor is scheduled, or during the  
18 course of the proceeding on the court's own motion, may order  
19 that the testimony of a minor ~~13~~ 17 years of age or younger at the  
20 time of the motion be taken by contemporaneous examination and  
21 cross-examination in another place and out of the presence of the  
22 judge, jury, defendant or defendants, and attorneys, and  
23 communicated to the courtroom by means of closed-circuit  
24 television, if the court makes all of the following findings:

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

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

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

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

6 (D) *An alleged offense of human trafficking, as defined in*  
7 *Section 236.1.*

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

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

16 (B) The defendant used a deadly weapon in the commission of  
17 the offense.

18 (C) The defendant threatened serious bodily injury to the child  
19 or the child's family, threatened incarceration or deportation of  
20 the child or a member of the child's family, threatened removal  
21 of the child from the child's family, or threatened the dissolution  
22 of the child's family in order to prevent or dissuade the minor from  
23 attending or giving testimony at any trial or court proceeding, or  
24 to prevent the minor from reporting the alleged sexual offense, or  
25 from assisting in criminal prosecution.

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

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

31 In making the determination required by this section, the court  
32 shall consider the age of the minor, the relationship between the  
33 minor and the defendant or defendants, any handicap or disability  
34 of the minor, and the nature of the acts charged. The minor's refusal  
35 to testify shall not alone constitute sufficient evidence that the  
36 special procedure described in this section is necessary to obtain  
37 the minor's testimony.

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

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

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

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

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

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

37 (1) Make a brief statement on the record, outside of the presence  
38 of the jury, of the reasons in support of its order. While the  
39 statement need not include traditional findings of fact, the reasons  
40 shall be set forth with sufficient specificity to permit meaningful

1 review and to demonstrate that discretion was exercised in a  
2 careful, reasonable, and equitable manner.

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

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

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

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

27 (f) When the court orders the testimony of a minor to be taken  
28 in another place outside the courtroom, only the minor, a support  
29 person designated pursuant to Section 868.5, a nonuniformed  
30 bailiff, any technicians necessary to operate the closed-circuit  
31 equipment, and, after consultation with the prosecution and the  
32 defense, a representative appointed by the court, shall be physically  
33 present for the testimony. A video recording device shall record  
34 the image of the minor and his or her testimony, and a separate  
35 video recording device shall record the image of the support person.

36 (g) When the court orders the testimony of a minor to be taken  
37 in another place outside the courtroom, the minor shall be brought  
38 into the judge's chambers prior to the taking of his or her testimony  
39 to meet for a reasonable period of time with the judge, the  
40 prosecutor, and defense counsel. A support person for the minor

1 shall also be present. This meeting shall be for the purpose of  
2 explaining the court process to the child and to allow the attorneys  
3 an opportunity to establish rapport with the child to facilitate later  
4 questioning by closed-circuit television. No participant shall discuss  
5 the defendant or defendants or any of the facts of the case with the  
6 minor during this meeting.

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

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

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

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

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

24 ~~SECTION 1. Section 261 of the Penal Code is amended to~~  
25 ~~read:~~

26 ~~261. (a) Rape is an act of sexual intercourse accomplished~~  
27 ~~with a person who is not the spouse of the perpetrator, under any~~  
28 ~~of the following circumstances:~~

29 ~~(1) Where a person is incapable, because of a mental disorder~~  
30 ~~or developmental or physical disability, of giving legal consent,~~  
31 ~~and this is known or reasonably should be known to the person~~  
32 ~~committing the act. Notwithstanding the existence of a~~  
33 ~~conservatorship pursuant to the provisions of the~~  
34 ~~Lanterman-Petris-Short Act (Part 1 (commencing with Section~~  
35 ~~5000) of Division 5 of the Welfare and Institutions Code), the~~  
36 ~~prosecuting attorney shall prove, as an element of the crime, that~~  
37 ~~a mental disorder or developmental or physical disability rendered~~  
38 ~~the alleged victim incapable of giving consent.~~

1 ~~(2) Where it is accomplished against a person's will by means~~  
2 ~~of force, violence, duress, menace, or fear of immediate and~~  
3 ~~unlawful bodily injury on the person or another.~~

4 ~~(3) Where a person is prevented from resisting by any~~  
5 ~~intoxicating or anesthetic substance, or any controlled substance,~~  
6 ~~and this condition was known, or reasonably should have been~~  
7 ~~known by the accused.~~

8 ~~(4) Where a person is at the time unconscious of the nature of~~  
9 ~~the act, and this is known to the accused. As used in this paragraph,~~  
10 ~~"unconscious of the nature of the act" means incapable of resisting~~  
11 ~~because the victim meets any one of the following conditions:~~

12 ~~(A) Was unconscious or asleep.~~

13 ~~(B) Was not aware, knowing, perceiving, or cognizant that the~~  
14 ~~act occurred.~~

15 ~~(C) Was not aware, knowing, perceiving, or cognizant of the~~  
16 ~~essential characteristics of the act due to the perpetrator's fraud in~~  
17 ~~fact.~~

18 ~~(D) Was not aware, knowing, perceiving, or cognizant of the~~  
19 ~~essential characteristics of the act due to the perpetrator's fraudulent~~  
20 ~~representation that the sexual penetration served a professional~~  
21 ~~purpose when it served no professional purpose.~~

22 ~~(5) Where a person submits under the belief that the person~~  
23 ~~committing the act is someone known to the victim other than the~~  
24 ~~accused, and this belief is induced by any artifice, pretense, or~~  
25 ~~concealment practiced by the accused, with intent to induce the~~  
26 ~~belief.~~

27 ~~(6) Where the act is accomplished against the victim's will by~~  
28 ~~threatening to retaliate in the future against the victim or any other~~  
29 ~~person, and there is a reasonable possibility that the perpetrator~~  
30 ~~will execute the threat. As used in this paragraph, "threatening to~~  
31 ~~retaliate" means a threat to kidnap, falsely imprison, or inflict~~  
32 ~~extreme pain, serious bodily injury, or death.~~

33 ~~(7) Where the act is accomplished against the victim's will by~~  
34 ~~threatening to use the authority of a public official to incarcerate,~~  
35 ~~arrest, or deport the victim or another, and the victim has a~~  
36 ~~reasonable belief that the perpetrator is a public official. As used~~  
37 ~~in this paragraph, "public official" means a person employed by~~  
38 ~~a governmental agency who has the authority, as part of that~~  
39 ~~position, to incarcerate, arrest, or deport another. The perpetrator~~  
40 ~~does not actually have to be a public official.~~

1     ~~(b) As used in this section, “duress” means a direct or implied~~  
2 ~~threat of force, violence, danger, or retribution sufficient to coerce~~  
3 ~~a reasonable person of ordinary susceptibilities to perform an act~~  
4 ~~that otherwise would not have been performed, or acquiesce in an~~  
5 ~~act to which one otherwise would not have submitted. The total~~  
6 ~~circumstances, including the age of the victim, and his or her~~  
7 ~~relationship to the defendant, are factors to consider in appraising~~  
8 ~~the existence of duress.~~  
9     ~~(c) As used in this section, “menace” means any threat,~~  
10 ~~declaration, or act which shows an intention to inflict an injury~~  
11 ~~upon another.~~