

Assembly Bill No. 1276

Passed the Assembly August 18, 2016

Chief Clerk of the Assembly

Passed the Senate August 11, 2016

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2016, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to add Section 1347.1 to the Penal Code, relating to criminal procedure.

LEGISLATIVE COUNSEL'S DIGEST

AB 1276, Santiago. 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, under specified conditions, a minor 15 years of age or younger to testify by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant or defendants, and attorneys if the testimony will involve the recitation of the facts of an alleged offense of human trafficking.

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

SECTION 1. Section 1347.1 is added to the Penal Code, to read:

1347.1. (a) In any criminal proceeding in which a defendant is charged with a violation of Section 236.1, upon written notice by the prosecutor made at least three 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, may order that the testimony of a minor 15

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 all of the following findings:

(1) The minor's testimony will involve a recitation of the facts of an alleged offense of human trafficking, as defined in Section 236.1.

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

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

(ii) The defendant used a deadly weapon in the commission of the offense.

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

(iv) The defendant inflicted great bodily injury upon the minor in the commission of the offense.

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

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

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

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

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

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

(3) In determining whether the impact on an individual minor of one or more of the five factors enumerated in clauses (i) to (v), inclusive, of subparagraph (A) of paragraph (2) of subdivision (a) is so substantial that the minor is unavailable as a witness unless two-way or one-way closed-circuit television is used, the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the support person, the prosecutor, and defense counsel present. The defendant or defendants shall not be present. The court shall conduct the questioning of the minor and shall not permit the prosecutor or defense counsel to examine the minor. The prosecutor and defense counsel shall be permitted to submit proposed questions to the court prior to the session in chambers. Defense counsel shall be afforded a reasonable opportunity to consult with the defendant or defendants prior to the conclusion of the session in chambers.

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

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

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

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

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

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

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

(f) When the court orders the testimony of a minor to be taken in another place outside the courtroom, the minor shall be brought into the judge's chambers prior to the taking of his or her testimony to meet for a reasonable period of time with the judge, the prosecutor, and defense counsel. A support person for the minor shall also be present. This meeting shall be for the purpose of explaining the court process to the minor and to allow the attorneys an opportunity to establish rapport with the minor to facilitate later questioning by closed-circuit television. A participant shall not discuss the defendant or defendants or any of the facts of the case with the minor during this meeting.

(g) When the court orders the testimony of a minor to be taken in another place outside the courtroom, this section does not prohibit the court from ordering the minor to be brought into the courtroom for a limited purpose, including the identification of the defendant or defendants as the court deems necessary.

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

(i) This section does not affect the disqualification of witnesses pursuant to Section 701 of the Evidence Code.

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

(k) This section shall not be construed to prohibit a defendant from being represented by counsel during any closed-circuit testimony.

Approved _____, 2016

Governor