

AMENDED IN ASSEMBLY JULY 2, 2015

AMENDED IN SENATE MARCH 18, 2015

**SENATE BILL**

**No. 176**

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**Introduced by Senators Mitchell and Anderson**  
**(Coauthors: Senators ~~Hall and Hertzberg~~ Hall, Hertzberg, Huff,**  
**and Stone)**

(Coauthors: Assembly Members *Bonilla, Chu, Cristina Garcia,*  
*Gonzalez, Lackey, Maienschein, McCarty, and Waldron*)

February 9, 2015

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An act to amend Section 1347 of the Penal Code, relating to crimes.

LEGISLATIVE COUNSEL'S DIGEST

SB 176, as amended, Mitchell. Examining children as witnesses.

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 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 13 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 violent felony, whether or not the minor is a victim.

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~~ *an* individual  
12 case present compelling evidence of the need to use these  
13 alternative procedures.

14 (b) Notwithstanding any other law, the court in a 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 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:

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

28 (B) An alleged violent felony, as defined in subdivision (c) of  
29 Section 667.5.

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

32 (2) The impact on the minor of one or more of the factors  
33 enumerated in subparagraphs (A) to (E), inclusive, is shown by

1 clear and convincing evidence to be so substantial as to make the  
2 minor unavailable as a witness unless closed-circuit testimony is  
3 used.

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

7 (B) The defendant used a deadly weapon in the commission of  
8 the offense.

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

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

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

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

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

32 (c) If the court orders the use of closed-circuit television,  
33 two-way closed-circuit television shall be used, except that if the  
34 impact on the minor of one or more of the factors enumerated in  
35 subparagraphs (A) to (E), inclusive, of paragraph (2) of subdivision  
36 (b), is shown by clear and convincing evidence to be so substantial  
37 as to make the minor unavailable as a witness even if two-way  
38 closed-circuit television is used, one-way closed-circuit television  
39 may be used. The prosecution shall give the defendant or  
40 defendants at least 30 days' written notice of the prosecution's

1 intent to seek the use of one-way closed-circuit television, unless  
2 *the prosecution shows* good cause ~~is shown~~ to the court why this  
3 30-day notice requirement should not apply.

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

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

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

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

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

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

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

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

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

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

28 (g) When the court orders the testimony of a minor to be taken  
29 in another place outside the courtroom, the minor shall be brought  
30 into the judge's chambers prior to the taking of his or her testimony  
31 to meet for a reasonable period of time with the judge, the  
32 prosecutor, and defense counsel. A support person for the minor  
33 shall also be present. This meeting shall be for the purpose of  
34 explaining the court process to the child and to allow the attorneys  
35 an opportunity to establish rapport with the child to facilitate later  
36 questioning by closed-circuit television. No participant shall discuss  
37 the defendant or defendants or any of the facts of the case with the  
38 minor during this meeting.

39 (h) When the court orders the testimony of a minor to be taken  
40 in another place outside the courtroom, nothing in this section

1 prohibits the court from ordering the minor to be brought into the  
2 courtroom for a limited purpose, including the identification of  
3 the defendant or defendants as the court deems necessary.

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

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

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

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