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CALIFORNIA LEGISLATURE—1997–98 REGULAR SESSION

ASSEMBLY BILL

No. 126

Introduced by Assembly Member Papan

January 15, 1997

An act to amend Sections 1346 and 1347.5 of the Penal Code, relating to criminal procedure.

LEGISLATIVE COUNSEL'S DIGEST

AB 126, as amended, Papan. Criminal procedure: testimony: witnesses.

Existing law authorizes the videotaping of the testimony at a preliminary hearing of a victim of specified sex crimes who is 15 years of age or less, or who is developmentally disabled, as defined, which testimony may be introduced in evidence at trial if the court finds that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable within specified provisions of the Evidence Code. Existing law also authorizes the court in a criminal proceeding relating to these sex crimes to order that the testimony of a minor or a person with a disability, as defined, be taken by contemporaneous examination and cross-examination in another place and out

of the presence of the judge, jury, defendant, and attorneys, and be communicated to the courtroom by means of closed-circuit television. Existing law also authorizes the court, in its discretion, to make accommodations to support the person with a disability.

This bill would authorize these procedures to be employed in these criminal proceedings in which other described serious crimes are involved.

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 1346 of the Penal Code is
2 amended to read:
3 1346. (a) When a defendant has been charged with
4 a violation of Section 211, 243.4, 245, 261, 261.5, 264.1, 273a,
5 273d, 285, 286, 288, 288a, 288.5, or 289, where the victim
6 either is a person 15 years of age or less or is
7 developmentally disabled as a result of mental
8 retardation, as specified in subdivision (a) of Section 4512
9 of the Welfare and Institutions Code, the people may
10 apply for an order that the victim’s testimony at the
11 preliminary hearing, in addition to being
12 stenographically recorded, be recorded and preserved on
13 videotape.
14 (b) The application for the order shall be in writing
15 and made three days prior to the preliminary hearing.
16 (c) Upon timely receipt of the application, the
17 magistrate shall order that the testimony of the victim
18 given at the preliminary hearing be taken and preserved
19 on videotape. The videotape shall be transmitted to the
20 clerk of the court in which the action is pending.
21 (d) If at the time of trial the court finds that further
22 testimony would cause the victim emotional trauma so
23 that the victim is medically unavailable or otherwise
24 unavailable within the meaning of Section 240 of the
25 Evidence Code, the court may admit the videotape of the
26 victim’s testimony at the preliminary hearing as former
27 testimony under Section 1291 of the Evidence Code.



1 (e) Any videotape which is taken pursuant to this
2 section is subject to a protective order of the court for the
3 purpose of protecting the privacy of the victim. This
4 subdivision does not affect the provisions of subdivision
5 (b) of Section 868.7.

6 (f) Any videotape made pursuant to this section shall
7 be made available to the prosecuting attorney, the
8 defendant, and his or her attorney for viewing during
9 ordinary business hours. Any videotape which is made
10 available pursuant to this section is subject to a protective
11 order of the court for the purpose of protecting the
12 privacy of the victim.

13 (g) The tape shall be destroyed after five years have
14 elapsed from the date of entry of judgment; provided,
15 however, that if an appeal is filed, the tape shall not be
16 destroyed until a final judgment on appeal has been
17 rendered.

18 SEC. 2. Section 1347.5 of the Penal Code is amended
19 to read:

20 1347.5. (a) It is the intent of the Legislature, in
21 enacting this section, to provide the court with discretion
22 to modify court procedures, as a reasonable
23 accommodation, to assure that adults and children with
24 disabilities who have been victims of an alleged sexual or
25 otherwise specified offense are able to participate
26 effectively in criminal proceedings. In exercising its
27 discretion, the court shall balance the rights of the
28 defendant against the right of the victim who has a
29 disability to full access and participation in the
30 proceedings, while preserving the integrity of the court's
31 truthfinding function.

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

35 (2) The right of the victim is not to confront the
36 perpetrator, but derives under both Section 504 of the
37 Rehabilitation Act of 1973 (29 U.S.C.A. Sec. 794) and the
38 Americans with Disabilities Act of 1990 (42 U.S.C.A. Sec.
39 12101 and following) as a right to participate in or benefit



1 from the same services or services that are equal or as
2 effective as those enjoyed by persons without disabilities.

3 (b) Notwithstanding any other law, in any criminal
4 proceeding in which the defendant is charged with a
5 violation of Section 211, 220, 243.4, 245, 261, 261.5, 273a,
6 273d, 285, 286, 288, 288a, 288.5, or 289, subdivision (1) of
7 Section 314, Section 647.6, former Section 647a, or ~~Section~~
8 ~~664~~ *with any attempt to commit a crime listed in this*
9 *subdivision*, committed with or upon a person with a
10 disability, the court in its discretion may make
11 accommodations to support the person with a disability,
12 including, but not limited to, any of the following:

13 (1) Allow the person with a disability reasonable
14 periods of relief from examination and cross-examination
15 during which he or she may retire from the courtroom.
16 The judge may also allow other witnesses in the
17 proceeding to be examined when the person with a
18 disability retires from the courtroom.

19 (2) Allow the person with a disability to utilize a
20 support person pursuant to Section 868.5 or a regional
21 center representative providing services to a
22 developmentally disabled individual pursuant to Article
23 1 (commencing with Section 4620) or Article 2
24 (commencing with Section 4640) of Chapter 5 of Division
25 4.5 of the Welfare and Institutions Code. In addition to, or
26 instead of, allowing the person with a disability to utilize
27 a support person or regional center representative
28 pursuant to this paragraph, the court may allow the
29 person with a disability to utilize a person necessary to
30 facilitate the communication or physical needs of
31 developmentally disabled individuals.

32 (3) Notwithstanding Section 68119 of the Government
33 Code, the judge may remove his or her robe if the judge
34 believes that this formal attire prevents full participation
35 of the person with a disability because it is intimidating
36 to him or her.

37 (4) The judge, parties, witnesses, support persons, and
38 court personnel may be relocated within the courtroom
39 to facilitate a more comfortable and personal
40 environment for the person with a disability as well as



1 accommodating any specific requirements for
2 communication by that person.

3 (c) The prosecutor may apply for an order that the
4 testimony of the person with a disability at the
5 preliminary hearing, in addition to being
6 stenographically recorded, be recorded and preserved on
7 videotape.

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

10 (2) Upon timely receipt of the application, the judge
11 shall order that the testimony of the person with a
12 disability given at the preliminary hearing be taken and
13 preserved on videotape. The videotape shall be
14 transmitted to the clerk of the court in which the action
15 is pending.

16 (3) If at the time of trial the court finds that further
17 testimony would cause the person with a disability
18 emotional trauma so that he or she is medically
19 unavailable or otherwise unavailable within the meaning
20 of Section 240 of the Evidence Code, the court may admit
21 the videotape of his or her testimony at the preliminary
22 hearing as former testimony under Section 1291 of the
23 Evidence Code.

24 (4) Any videotape that is taken pursuant to this
25 subdivision is subject to a protective order of the court for
26 the purpose of protecting the privacy of the person with
27 a disability. This subdivision does not affect the provisions
28 of subdivision (b) of Section 868.7.

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



1 closed-circuit television, if the court makes all of the
2 following findings:

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

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

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

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

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

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

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



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

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

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

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

37 (2) Instruct the members of the jury that they are to
38 draw no inferences from the use of closed-circuit
39 television as a means of assuring the full participation of



1 the victim who is a person with a disability by
2 accommodating that individual's disability.

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

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

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

30 (g) When the court orders the testimony of a victim
31 who is a person with a disability to be taken in another
32 place outside the courtroom, nothing in this section shall
33 prohibit the court from ordering the victim to appear in
34 the courtroom for a limited purpose, including the
35 identification of the defendant or defendants as the court
36 deems necessary.

37 (h) The examination shall be under oath, and the
38 defendant shall be able to see and hear the person with
39 a disability. If two-way closed-circuit television is used,



1 the defendant's image shall be transmitted live to the
2 person with a disability.

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

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

9 (k) This section shall not be construed to obviate the
10 need to provide other accommodations necessary to
11 ensure accessibility of courtrooms to persons with
12 disabilities nor prescribe a lesser standard of accessibility
13 or usability for persons with disabilities than that
14 provided by Title II of the Americans with Disabilities Act
15 of 1990 (42 U.S.C.A. Sec. 12101 and following) and federal
16 regulations adopted pursuant to that act.

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