

Assembly Bill No. 126

CHAPTER 97

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

[Approved by Governor July 3, 1998. Filed with
Secretary of State July 6, 1998.]

LEGISLATIVE COUNSEL'S DIGEST

AB 126, 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.

The bill would also require the Judicial Council to report to the Legislature, no later than 2 years after the enactment of its provisions, on the frequency of the use and effectiveness of admitting the videotape of testimony by means of closed-circuit television.

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

SECTION 1. Section 1346 of the Penal Code is amended to read:

1346. (a) When a defendant has been charged with a violation of Section 220, 243.4, 261, 261.5, 264.1, 273a, 273d, 285, 286, 288, 288a, 288.5, 289, or 647.6, where the victim either is a person 15 years of age or less or is developmentally disabled as a result of mental retardation, as specified in subdivision (a) of Section 4512 of the Welfare and Institutions Code, the people may apply for an order that the victim's testimony at the preliminary hearing, in addition to

being stenographically recorded, be recorded and preserved on videotape.

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

(c) Upon timely receipt of the application, the magistrate shall order that the testimony of the victim given at the preliminary hearing be taken and preserved on videotape. The videotape shall be transmitted to the clerk of the court in which the action is pending.

(d) If at the time of trial the court finds that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable within the meaning of Section 240 of the Evidence Code, the court may admit the videotape of the victim's testimony at the preliminary hearing as former testimony under Section 1291 of the Evidence Code.

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

(3) If at the time of trial the court finds that further testimony would cause the person with a disability emotional trauma so that he or she is medically unavailable or otherwise unavailable within the



meaning of Section 240 of the Evidence Code, the court may admit the videotape of his or her testimony at the preliminary hearing as former testimony under Section 1291 of the Evidence Code.

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

(d) Notwithstanding any other law, the court in any criminal proceeding, upon written notice of the prosecutor made at least three days prior to the date of the preliminary hearing or trial date on which the testimony of the person with a disability is scheduled, or during the course of the proceeding on the court's own motion, may order that the testimony of the person with a disability be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, and defendant, and communicated to the courtroom by means of two-way closed-circuit television, if the court makes all of the following findings:

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

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

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

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

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

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



(e) (1) The hearing on the motion brought pursuant to this subdivision 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 person with a disability to testify at the hearing; nor shall the court deny the motion on the ground that the person with a disability has not testified.

(3) In determining whether the impact on an individual person with a disability of one or more of the factors enumerated under paragraph (2) of subdivision (d) is so substantial that the person is unavailable as a witness unless the closed-circuit television procedure is employed, the court may question the person with a disability 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 described under paragraph (2) of subdivision (b), the prosecutor, and defense counsel present. At this time the court shall explain the process to the person with a disability. The defendant or defendants shall not be present; however, the defendant or defendants shall have the opportunity to contemporaneously observe the proceedings by closed-circuit television. Defense counsel shall be afforded a reasonable opportunity to consult with the defendant or defendants prior to the conclusion of the session in chambers.

(f) When the court orders the testimony of a victim who is a person with a disability 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 assuring the full participation of the victim who is a person with a disability by accommodating that individual's disability.

(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 person, if the person is part of the court's accommodation of the disability, 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 person with a disability.

(5) Order that a complete record of the examination of the person with a disability, including the images and voices of all persons who in any way participate in the examination, be made and preserved on videotape in addition to being stenographically recorded. The



videotape 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, and his or her attorney, during ordinary business hours. The videotape shall be destroyed after five years have elapsed from the date of entry of judgment. If an appeal is filed, the tape shall not be destroyed until a final judgment on appeal has been ordered. Any videotape 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 person with a disability. This subdivision does not affect the provisions of subdivision (b) of Section 868.7.

(g) When the court orders the testimony of a victim who is a person with a disability to be taken in another place outside the courtroom, nothing in this section shall prohibit the court from ordering the victim to appear in 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 shall be able to see and hear the person with a disability. If two-way closed-circuit television is used, the defendant's image shall be transmitted live to the person with a disability.

(i) Nothing in this section shall 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 obviate the need to provide other accommodations necessary to ensure accessibility of courtrooms to persons with disabilities nor prescribe a lesser standard of accessibility or usability for persons with disabilities than that provided by Title II of the Americans with Disabilities Act of 1990 (42 U.S.C.A. Sec. 12101 and following) and federal regulations adopted pursuant to that act.

(l) The Judicial Council shall report to the Legislature, no later than two years after the enactment of this subdivision, on the frequency of the use and effectiveness of admitting the videotape of testimony by means of closed-circuit television.

