
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 1276 **Hearing Date:** June 28, 2016
Author: Santiago
Version: January 4, 2016
Urgency: No **Fiscal:** No
Consultant: MK

Subject: *Child Witnesses: Human Trafficking*

HISTORY

Source: Author

Prior Legislation: SB 138 (Maldonado) – Chapter 480, Stats. 2005
AB 2143 (Maldonado) – 2004 failed
Assembly Committee on Public Safety
SB 1559 (Figueroa) – Chapter 96, Stats. 2002
SB 1715 (Ortiz) – Chapter 207, Stats. 2000
AB 1692 (Bowen) – Chapter 670, Stats. 1998
AB 1077 (Cardoza) – Chapter 669, Stats. 1998

Support: Alameda County District Attorney; California Catholic Conference; California District Attorneys Association; California Peace Officers' Association; California State Lodge, California Coalition for Youth; Fraternal Order of Police; CASA of Los Angeles; Children's Law Center of California; City of Oakland; Coalition to Abolish Slavery and Trafficking; Consumer Attorneys of California; Judicial Council of California; Junior Leagues of California State Public Affairs Committee; League of California Cities; Long Beach Police Officers Association; Los Angeles County Professional Peace Officers Association; Los Angeles County Sheriffs' Department; Mary Magdalene Project, Inc.; National Council of Jewish Women California; Peace Officers Research Association of California; San Diego County District Attorney; Santa Clara University's Katherine and George Alexander Community Law Center; Sacramento County Deputy Sheriffs' Association; Sacramento County Sheriff's Department; Santa Ana Police Officers Association; 1 individual

Opposition: American Civil Liberties Union; California Attorneys for Criminal Justice; California Public Defenders Association; Legal Services for Prisoners with Children

Assembly Floor Vote: 77 - 0

ANALYSIS REFLECTS AUTHORS AMENDMENTS TO BE OFFERED IN COMMITTEE

PURPOSE

The purpose of this bill is to authorize a minor, 15 years of age or younger, to testify at trial out of the presence of the defendant and jury by way of closed-circuit television in human trafficking cases.

Existing law provides that any person who deprives or violates the personal liberty of any other with the intent to obtain forced labor or services is guilty of human trafficking and shall be punished in state prison for 5, 8, or 12 years and a fine of not more than \$500,000. (Penal Code § 236.1 (a).)

Existing law states that any person who deprives or violates the personal liberty of any other with the intent to effect or maintain a violation of specified offenses related to sexual conduct, obscene matter or extortion is guilty of human trafficking and shall be punished by imprisonment in the state prison for 8, 14 or 20 years and a fine of not more than \$500,000. (Penal Code § 236.1 (b).)

Existing law specifies that the following penalties for any person who causes, induces, or persuades, or attempts to cause, induce, persuade, a person who is minor at the time of commission of the offense to engage in a commercial sex act, as either 5, 8, or 12 years and a fine of not more than \$500,000; or, 15-years-to-life and a fine of not more than \$500,000 when the offense involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person. (Penal Code § 236.1 (c).)

Existing law states that it is the intent of the Legislature to provide the court with discretion to employ alternative court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process. In exercising its discretion, the court necessarily will be required to balance the rights of the defendant or defendants against the need to protect a child witness and to preserve the integrity of the court's truthfinding function. This discretion is intended to be used selectively when the facts and circumstances in an individual case present compelling evidence of the need to use these alternative procedures. (Penal Code § 1347 (a).)

Existing law authorizes a court in a criminal proceeding, 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 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 all of the following findings:

- a. The minor's testimony will involve a recitation of the facts of any of the following:
 - i. An alleged sexual offense committed on or with the minor;
 - ii. An alleged violent felony, as defined; or,

- iii. An alleged felony offense of willful harm or injury to a child or corporal punishment of a child of which the minor is a victim;
- b. The impact on the minor of one or more of the factors enumerated in the following paragraphs, 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 child suffering serious emotional distress so that the child 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 child or the child's family, threatened incarceration or deportation of the child or a member of the child's family, threatened removal of the child from the child's family, or threatened the dissolution of the child'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 child 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.
- c. 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. (Penal Code § 1347 (b).)

Existing law directs the court, in making the determination required by this section, to 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. (Penal Code § 1347 (b)(2)(E).)

Existing law allows the court to 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. (Penal Code § 1347 (d)(3).)

Existing law provides that when a court orders the testimony of a minor to be taken in another place outside the courtroom, nothing in this section prohibits 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. (Penal Code § 1347 (h).)

Existing law states that it is the intent of the Legislature in enacting this section to provide the court with discretion to employ alternative court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process. In exercising its

discretion, the court necessarily will be required to balance the rights of the defendant or defendants against the need to protect a child witness and to preserve the integrity of the court's truthfinding function. This discretion is intended to be used selectively when the facts and circumstances in the individual case present compelling evidence of the need to use these alternative procedures. (Penal Code, § 1347 (a).)

This bill as proposed to be amended, would authorize a minor 15 years of age or younger to testify at trial out of the presence of the defendant and the jury by way of closed circuit television in a human trafficking case.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;

- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

Current law allows minors who are victims of specified crimes, such as sexual assault offense, violent felony, corporal punishment, etc., to testify in court by means of closed-circuit television. However, the crime of human trafficking is not among the listed specified crimes. This leaves many minor victims of human trafficking without the option of testifying by means of closed-circuit television.

Furthermore, current age restrictions exclude victims who are between the age of 14 and 17 and have also suffered severe trauma. Although maturity levels are different from a 13 to a 17 year old, a victim of a crime can suffer extreme trauma regardless if they are 13, 14, 15, 16, or 17 years of age. In various instances, a minor is defined as a person who is 18 years of age or younger in the California penal code. Moreover, both California and the federal government define a “minor” victim of human trafficking as a person who is 18 years of age or younger (Penal Code 236.1). AB 1276 seeks to protect all minors who are victims of human trafficking, both sex and labor, from additional trauma and secondary victimization by including an alleged offense of human trafficking and by increasing the age of a minor from 13 to 17 years of age or younger.

2. Sixth Amendment Right to Confrontation

The Sixth Amendment of the U.S. Constitution provides, that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., amend. VI.) The constitutional right of the accused to confront witnesses against him or her is a fundamental right essential to a fair trial. (*Pointer v. Texas* (1965) 380 U.S. 400.) Fundamental rights are the most important rights guaranteed in the Constitution, and the protection of the right to confrontation is as important as the freedom of speech and the freedom of religion. The right guaranteed under the confrontation clause includes the right to face the person's accuser, requiring the witness to make his or her statements under oath, thus impressing upon the witness the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; forcing the witness to submit to cross-examination; and permitting the jury to observe the demeanor of the witness in making his or her statement, thus aiding the jury in assessing the witness's credibility. (*Maryland v. Craig* (1990) 497 U.S. 836, 845-846.) The Sixth Amendment right to confrontation guarantees the defendant a face-to-face meeting with witnesses against him. (*Maryland v. Craig*, supra, 497 U.S. at p. 855, citing *Coy v. Iowa* (1988) 487 U.S. 1012, 1016.) The purpose of this guarantee originates from the desire to prevent conviction by

anonymous accusers and absentee witnesses. (*Ibid.*) "[F]ace-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person. . . . ('It is always more difficult to tell a lie about a person "to his face" than "behind his back." . . . That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult.')." (*Maryland v. Craig* (1990) 497 U.S. at pp. 846-847, citing *Ohio v. Roberts* (1980) 448 U.S. 56, 63.)

The right to confront witnesses face-to-face, however, is not an indispensable element of the confrontation clause. (*Maryland v. Craig*, supra, 497 U.S. 836.) The *Maryland v. Craig*, supra, case involved sexual abuse of a 6-year-old child. The prosecutor relied on a state statutory procedure permitting a judge to receive, by one-way closed circuit television, the testimony of an alleged child abuse victim upon determining that the child's courtroom testimony would result in the child suffering serious emotional distress, such that he or she could not reasonably communicate. The Supreme Court held that "the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." (*Maryland v. Craig*, supra, 497 U.S. at p. 855.)

The Supreme Court cautioned, however, that their ruling "[t]hat the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in *Coy*, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. (*Maryland v. Craig*, supra, 497 U.S. at p. 850.) Four Justices dissented in the majority opinion. Justice Scalia, writing for the dissent, stated "[t]he purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court." (*Maryland v. Craig*, supra, 497 U.S. at p. 861.)

In fact, "[i]n recent years, the Supreme Court of the United States' understanding of the meaning of this Clause may well be the single part of constitutional law – certainly of criminal procedure – that has undergone the most radical change.

"Two Supreme Court judgments [in recent years] have introduced this change and have greatly expanded the right of the accused in criminal prosecutions to confront the witnesses against them." (See Fenner, *Today's Confrontation Clause (After Crawford and MelendezDiaz)*, (Nov. 2009) 43 *Creighton L.Rev.* 35, p. 101, (as of May 1, 2015).)

3. Closed Circuit Television in Human Trafficking Cases

Existing law allows for contemporaneous testimony by closed circuit television in a case where a child under the age of 14 is a victim of a sex or violent offense when specified conditions are met. This bill takes that existing framework and applied it to victims of human trafficking who are under the age of 15.

Unlike the trend noted in the discussion of the case law above, this bill appears to further erode a defendant's right to confront his or her accuser. In addition, the human trafficking statute authorizes severe punishments, including substantial terms of imprisonment in state prison. If

the crime involves a minor, a defendant may face up to 20 years in state prison, and in some instances imprisonment for 15-years-to-life. (Penal Code, § 236.1.)

Considering how serious the existing punishments are for human trafficking, does an expansion of the circumstances that would allow witnesses to avoid face-to face confrontation with the defendant infringe on the Constitutional right to confrontation?

4. Contemporaneous Testimony for Child Witnesses: Legislative History

Existing law provides courts with discretion to authorize a child victim under 14 to testify by means of closed-circuit television in specified felony cases. The court must make a finding by clear and convincing evidence that the impact on the minor is so substantial as to make the minor unavailable and one or more of the enumerated factors exist. The court may hear testimony from witnesses such as a social worker or therapist to establish the impact on the minor. A child's refusal to testify does constitute sufficient evidence that the contemporaneous testimony is necessary. (Penal Code § 1347.)

Prior to 1998, this statute applied to child victims 10 years of age or younger. This statute was amended by AB 1692 (Bowen), Chapter 670, Statutes of 1998, to apply the procedure to child victims who were 13 years of age or younger. AB 1692, as amended April 27, 1998, applied these provisions to child witnesses 15 years of age or younger. "Responding to the suggestion that section 1347 should be consistent with the law that punishes more severely lewd acts upon a child 'under the age of 14' (Assem. Com. on Public Safety, Analysis of AB 1692 (1997–1998 Reg. Sess.) as amended Apr. 27, 1998, p. 3; see Sen. Com. on Public Safety, Analysis of AB 1692 (1997–1998 Reg. Sess.) as amended June 23, 1998), the Legislature revised the statute to authorize courts to order the testimony of a minor '13 years of age or younger' to be taken by closed-circuit television." (*People v. Cornett* (2012) 53 Cal. 4th 1261, 1269.)

5. Enhanced Protections for Children Under 14 Years Old

While a person under the age of 18 is a minor under the law, the statute authorizing contemporaneous testimony is more narrowly tailored to protect young children under the age of 14, not all minors, from the trauma of facing his or her abuser in court. (Penal Code § 1347.) Limiting this enhanced protection to children under 14 years old reflects the state's interest in protecting young children from harm, while still balancing the rights of the defendant and protecting the integrity of the judicial process. (Penal Code § 1347 (a).) The state's deliberate protection of children under 14 is evidenced by the existence of current statutes that punish more harshly an act committed against a child under the age of 14 compared to acts committed against children 14 and over. (Penal Code §§ 264 (c)(1); 264.1 (b)(1); 271; 286 (c)(2)(B), 288 (a); 288a (c)(2)(B); 288.5; 289 (a)(1)(B); 667.61 (j)(2); 667.8; 667.85; and 667.9.) Furthermore, the state's juvenile court system also demonstrates this enhanced protection for minors who are under the age of 14 and charged with committing a crime. The statutory framework that authorizes minors to be tried in adult court rather than juvenile court for the commission of serious offenses applies to minors 14 years of age and older. (Welf. & Inst. Code § 707 (b).) Because Penal Code Section 1347 interferes with a defendant's constitutional right to confrontation, the statute must be narrowly tailored to serve a compelling state interest (*Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, 607.) The compelling state interest is the desire to provide children under 14 with more protections than older children.

By allowing a witness under the age of 15 to testify through the use of closed-circuit television in human trafficking cases, is this bill narrowly tailored to meet a compelling state interest as required to pass constitutional muster?

6. Support

The San Diego County District Attorney supports this bill stating:

Testifying in court can be particularly traumatic for minors who are victims of human trafficking. Facing the perpetrator in court and recalling the horrifying and personal details of the abuse forces the victims to relive the crime mentally and emotionally, leading them to feel as though the abuse is recurring and re-experiencing a lack of control and terror. Furthermore, the minor victims' inability to communicate effectively in court or refusal to testify against their trafficker can lead to ineffective prosecution of the case.

It is important that California protects minors who are victims of human trafficking from additional trauma during criminal proceedings. By allowing victims of human trafficking who are 17 years of age or younger to testify out of the presence of the judge, jury, defendant(s), and attorneys by means of closed-circuit television, AB 1276 will protect minors from suffering additional trauma.

7. Opposition

The American Civil Liberties Union opposes this bill stating:

By expanding the use of closed circuit television to teenage witnesses, AB 1276 strays too far from the circumstances in which this procedure has been approved by the U.S. Supreme Court. AB 1276 is thus likely to lead to violations of the right to confront witnesses, as protected by the Sixth Amendment Confrontation Clause.

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