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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

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**Bill No:** SB 176                      **Hearing Date:** April 7, 2015  
**Author:** Mitchell  
**Version:** March 18, 2015  
**Urgency:** No                                      **Fiscal:** No  
**Consultant:** MK

**Subject:** *Examining Children as Witnesses*

## HISTORY

**Source:** Californians for Safety and Justice

**Prior Legislation:** AB 1900 (Quirk) – Ch. 160, Stats. of 2014  
SB 138 (Maldonado) – Ch. 480, Stats. of 2005  
AB 20 (Lieber) – Ch. 823, Stats. of 2004  
AB 2143 (Maldonado) – 2004, failed passage, Assembly Committee on Public Safety  
SB 1559 (Figueroa) – Chapter 96, Stats. of 2002  
SB 1715 (Ortiz) – Chapter 207, Stats. of 2000  
AB 1692 (Bowen) – Chapter 670, Stats. of 1998  
AB 1077 (Cardoza) – Chapter 669, Stats. of 1998

**Support:** California District Attorneys Association

**Opposition:** California Public Defenders Association

## PURPOSE

*The purpose of this bill is to allow a child witness to a violent felony to testify by contemporaneous examination and cross-examination through closed-circuit television, as specified, whether or not the minor is a victim.*

*Existing law* provides that in all criminal prosecutions, the accused shall enjoy the right ... to be confronted by the witnesses against him ... (U.S. Constitution, Amendment VI.)

*Existing law* provides that when a defendant is charged with specified sex offenses, child abuse, lewd and lascivious acts on a child, and the victim either is a person 15 years of age or less or is developmentally disabled as a result of an intellectual disability, as specified, 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. (Penal Code, § 1346(a).)

*Existing law* states that at the time of trial, if the court finds that further testimony in any of the qualifying cases would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable within the statutory definition of unavailability, the court

may admit the videotape of the victim's testimony at the preliminary hearing, as specified. (Penal Code, § 1346(d).)

*Existing law* establishes that a videotape prepared for court testimony is subject to a protective order of the court to protect the privacy of the victim and must be made available to the prosecuting attorney, the defendant, and his/her attorney for viewing during business hours. The videotape is to be destroyed five years from the date of judgment, unless an appeal is filed. (Penal Code, § 1346(e), (f), and (g).)

*Existing law* provides that when a defendant is charged with spousal rape or infliction of corporal injury resulting in a traumatic injury to a spouse, former spouse, or domestic partner, 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. If the victim's testimony at the preliminary hearing is admissible, the videotape recording may be introduced as evidence at trial (Penal Code, § 1346.1(a) and (d).)

*Existing law* allows, in cases where a minor, 13 years or younger, will testify that a sexual offense was committed against or with the minor, or that the minor was a victim of a violent felony, as defined, that the minor may testify by way of contemporaneous examination and cross examination in another location and communicated to the courtroom by closed-circuit television if the court finds that the impact on the minor of one or more of the following is shown by clear and convincing evidence to make the minor unavailable as a witness unless closed-circuit television is used:

- a) 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;
- b) The defendant used a deadly weapon in the commission of the offense;
- c) Threats of serious bodily injury to be inflicted on the minor or a family member, of incarceration or deportation of the minor or a family member, or of removal of the minor from the family or dissolution of the 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 the prosecution;
- d) The defendant inflicted great bodily injury upon the child in the commission of the offense; or,
- e) 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. (Penal Code § 1347(b).)

*This bill* would allow a child witness to a violent crime to also testify by contemporaneous examination and cross examination in another location communicated to the courtroom by closed-circuit television when the factors are met.

#### RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight 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 February of this year the administration reported that as “of February 11, 2015, 112,993 inmates were housed in the State’s 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity.”( Defendants’ February 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).

While significant gains have been made in reducing the prison population, the state now 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:

Across the United States, thousands of children testify each year as both witnesses and victims in a variety of legal settings, from family court proceedings to serious criminal cases. The number of children called to testify has increased steadily since the 1990’s, especially as new research emerged indicating that memory accuracy in minors is better than previously thought. However, even though children are capable of accurately reporting past events, for many, the pressures associated with testifying in a courtroom can severely limit their ability to

accurately testify. This is especially true in cases involving a criminal defendant with whom the child witness has had a violent, abusive, or otherwise scarring relationship or interaction.

In an attempt to protect child witnesses from such traumatizing experiences, many states have enacted statutes that allow the judges to employ alternative witness examination procedures. These alternative procedures include the use of two-way closed-circuit television to receive child witness testimony, the provision of “comfort items” for the child, the provision of a physical partition between the child and defendant, and the relocation of certain parties within the courtroom to make the child more comfortable. Unfortunately, many of these state statutes suffer from a crucial deficit with regard to child witnesses in criminal cases: they only explicitly provide protections for child witnesses who are the direct victims of the alleged crime. California law suffers from this shortcoming.

This bill would remedy that deficiency by expressly extending to non-victim child witnesses specific protections available to victim child witnesses under California Penal Code § 1347. Additionally, it would give extra weight to the interests of the child witness—victim or non-victim—in any court determination regarding whether these protections should be provided in a given case.

## 2. Child Witnesses

Under existing law, a child victim of a violent felony can testify by closed circuit television if the court finds by clear and convincing evidence that the impact on the minor is so substantial as to make the minor unavailable and one or more factors exist. Courts have found that this section does not violate the confrontation clause. (*See* for example *People v. Powell* (2011) 194 Cal App. 4<sup>th</sup> 1268.)

This bill would extend this law to include a child *witness* who is not the victim of a violent crime. At least one trial court applied this section to a child witness and an appellate court upheld the court’s ability to do so:

We hold that the trial court possessed the inherent authority to permit the use of two-way, closed-circuit TV for a child witness after the necessity for that procedure was demonstrated, even though she was not a victim. In light of this holding, we need not address the State’s alternative argument that Vanessa was a “victim,” within the meaning of section 1347, subdivision (b), of various uncharged crimes. (*People v. Lujan* (2012) 211 Cal. App. 4th 1499, 1508)

The author believes this bill will “establish much-needed support systems for non-victim minors who testify in criminal court proceedings.”

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