# SENATE COMMITTEE ON PUBLIC SAFETY

**Senator Nancy Skinner, Chair**
**2017 - 2018 Regular**

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| **Bill No:** | AB 1736 | **Hearing Date:** | May 15, 2018 |
| **Author:** | Cunningham | | |
| **Version:** | February 14, 2018 | | |
| **Urgency:** | No | **Fiscal:** | No |
| **Consultant:** | MK | | |

**Subject:** ***Evidence: Hearsay: Prior Inconsistent Statements***

## HISTORY

Source: Author

Prior Legislation: None

Support: California District Attorneys Association; California Statewide Law Enforcement Association; Riverside Sheriffs' Association

Opposition: American Civil Liberties Union of California; California Public Defenders Association

Assembly Floor Vote: 67 - 0

## PURPOSE

***The purpose of this bill is to extend the "prior inconsistent statement" exception to the hearsay rule to conditional examinations and to allow audio recordings***.

*Existing law* provides the right of the accused to face their accuser. (U.S. Const. amend. VI; Cal. Const., art. 1, §15.)

*Existing law* provides, in case law, that a defendant's right of confrontation is satisfied if they are afforded an opportunity to cross-examine the witness. (*Crawford v. Washington* (2004) 541 U.S. 36, 54-55.)

*Existing law* requires that, unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing must be excluded unless one of the following applies:

- The witness while testifying had an opportunity to explain or to deny the statement.
- The witness was not excused from giving further testimony in the action. (Evidence Code § 770.)

*Existing law* allows the examination of a defendant conditionally when one of the following applies:

- The witness is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he or she will not be able to attend the trial, or is a person 65 years of age or older, or a dependent adult, or that the life of the witness is in jeopardy;

- The witness is a victim or a material witness in a human trafficking case who has been or is being intimidated or threatened from cooperating with the prosecutor or testifying at trial;

- The witness is a victim or material witness in a domestic violence case who has been or is being intimidated or threatened from cooperating with the prosecutor or testifying at trial. (Penal Code § 1337.)

*Existing law* allows a conditional examination to be ordered if the court or judge deems it necessary and shall be taken before a designated magistrate. (Penal Code § 1339.)

*Existing law* requires the testimony to be reduced to writing and authenticated, or video recorded, and shall be sealed and transmitted to the Clerk of the Court pending trial. (Penal Code §§ 1343 and 1344.)

*Existing law* defines "hearsay evidence" as a statement that was made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated and is inadmissible, except as provided by law. (Evidence Code §1200.)

*Existing law* provides an exception to the hearsay rule for former testimony if the declarant is unavailable as a witness and one of the following applies (Evidence Code § 1291(a)):

- The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person. (Section 1291(a)(1).)

- The party against whom the prior inconsistent statement is offered had the right and opportunity to cross-examine any witness who testified at the preliminary hearing or prior proceeding as to the statements of the witness. (Section 1291(a)(2).)

*Existing law* provides an exception to the hearsay rule for prior inconsistent statements of a witness that were properly admitted in a prior preliminary hearing or trial of the same criminal matter if the witness is later unavailable and former testimony of the witness was admitted as a prior inconsistent statement pursuant to, Evidence Code Section 1291, provided that the statement is included in one of the following:

- A video recorded statement introduced at the preliminary hearing or prior proceeding. (Section 1294(a)(1).)

- A transcript of the preliminary hearing or prior proceeding. (Section 1294(a)(2).)

*Existing law* allows the party against whom the prior inconsistent statements are offered, to examine or cross-examine any person who testified at the preliminary hearing or prior proceeding, as to the prior inconsistent statements of the witness. (Evidence Code § 1294 (b))

*This bill* includes audio recording as an acceptable means to admit prior unsworn statements.

*This bill* adds conditional examinations to the pre-trial proceedings through which a prior unsworn inconsistent statement may be admitted later.

*This bill* clarifies that the term "conditional examination" is described in Part 2, Title 10, Chapter 4 of the Penal Code.

## COMMENTS

### 1. Need for This Bill

According to the author:

> When a victim/witness is legally unavailable to testify at trial, Evidence Code Section 1291 provides a mechanism for introducing prior sworn testimony of that witness/victim. If the witness testified at the prior hearing in a manner that was inconsistent with prior unsworn statements, the previous unsworn statements were not admissible at trial to prove that the prior unsworn statements are true. Evidence Code section 1294 provided a carve-out that allowed the prior unsworn statements to be admitted at trial to prove that the subject matter in those statements were true only if those statements were "properly admitted" in the prior "preliminary hearing or trial."
>
> Currently, Penal Code sections 1335-1336 allow for conditional examinations in certain enumerated circumstances (such as if the witness is elderly or infirm, about to leave the state, or in certain human trafficking situations, etc.). Under the current state of the law, if the prior testimony of an unavailable witness was given at a conditional examination rather than a preliminary hearing or prior trial, section 1294's provision for the admissibility of prior unsworn statements would not apply. The rationale underlying section 1294 applies to conditional examinations as well.

### 2. The Right to Confrontation

Under both the U.S. and California constitutions, criminal defendants have the right to confront witnesses against them. (U.S. Const., amend. VI; Cal Const. art. 1, Sect. 15.) Hearsay statements made by an absent witness are presumptively inadmissible because they violate this right to confront and cross-examine witnesses. However, when the defendant is given an opportunity to cross-examine the witness in a prior proceeding, the defendant's right to confront and cross-examine them is satisfied and the declarant's statements are no longer inadmissible. (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54.) The Evidence Code codifies this exception to the hearsay rule and allows former testimony to be admitted in a later proceeding. (See Evidence Code §§ 1290, 1291 (a)(2).)

### 3. Prior Inconsistent Statements

Evidence of a witness's prior out-of-court statement that is inconsistent with the witness's in-court testimony is generally inadmissible. (Evidence Code § 770.) However, the Evidence Code

allows prior inconsistent statements to be admitted under some circumstances, including when the declarant is a witness in a court proceeding and has an opportunity to explain or to deny the inconsistencies between the statements. (Evidence Code § 770(a).)

The Evidence Code further allows a prior inconsistent statement of a declarant to be admitted as evidence, even when the hearsay declarant is not available to testify as a witness at trial under two conditions: (1) there was a *prior opportunity* for the declarant to explain or deny the inconsistency at certain prior court proceedings–specifically preliminary hearings and trials– about the same criminal matter; and (2) there is a video recording or certified transcript of the prior testimony. (Evidence Code § 1294)

**4. Conditional Examinations**

A conditional examination is a pre-trial hearing in which the testimony of a witness who is anticipated to be unavailable for trial is recorded and preserved. The conditions for a conditional examination include circumstances where the witness is elderly or infirm, or is about to leave the state. (Penal Code § 1337.) There are additional parameters that allow the testimony of certain witnesses in human trafficking, domestic violence, and "other serious crimes" to be taken at a conditional examination because the witness may be subject to a higher degree of influence by the defendant or the defendant's agents. (Penal Code §§1335, 1336.) Conditional examinations are similar to preliminary examinations in many ways, including the fact that the defendant has the right to be present and to cross-examine the witness who is conditionally examined. (Penal Code § 1340.) The Penal Code also requires that a written transcript, or a video recording of the proceeding is made and that the record is preserved by the county clerk. (Penal Code §§ 1343, 1344.)

**5. Expansion of Hearsay Exception**

This bill expands Evidence Code Section 1294 to allow for prior statements admitted in a conditional examination and to allow the testimony to be audio recorded. This bill provides that a conditional examination is as defined Penal Code Section 1335 et seq.

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