SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No:	AB 1927	**Hearing Date:**	July 31, 2020
Author:	Boerner Horvath		
Version:	July 2, 2020		
Urgency:	No	**Fiscal:**	No
Consultant:	SC		

Subject: ***Witness Testimony in Sexual Assault Cases: Inadmissability in a Separate Prosecution***

HISTORY

Source: Alameda County District Attorney's Office
California District Attorneys Association
San Diego County District Attorney's Office

Prior Legislation: SB 233 (Wiener), Ch. 141, Stats. 2019
AB 2243 (Friedman) Ch. 27, Stats. 2018

Support: California Coalition Against Sexual Assault; California Legislative Women's Caucus; Center for Community Solutions; Change for Justice; County of San Diego; Crime Victims United of California; End Violence Against Women International; Southern California Public Health Association

Opposition: None known

Assembly Floor Vote: 77 - 0

PURPOSE

The purpose of this bill is to make the testimony of a victim or witness in a felony prosecution for specified sex crimes that the victim or witness, at or around the time of crime, unlawfully possessed or used a controlled substance or alcohol inadmissible in a separate prosecution of that victim or witness to prove illegal possession or use of that controlled substance or alcohol.

Existing law prohibits the admission of evidence that a person was in possession of condoms in a prosecution for a prostitution-related offense. (Evid. Code § 782.1.)

Existing law prohibits the admission of evidence that a victim of, or a witness to, a serious felony, as defined, assault, domestic violence, extortion, sexual battery, or stalking, each as specified, has engaged in an act of prostitution at or around the time they were the victim of or witness to the crime is inadmissible in a separate prosecution of that victim or witness to prove criminal liability for the act of prostitution. (Evid. Code, § 1162.)

Existing law prohibits the arrest of a person for a misdemeanor controlled substances offense or a prostitution offense if the person reports being a victim of, or a witness to, a serious felony, as defined, assault, domestic violence, extortion, sexual battery, or stalking, each as specified, if the

person was engaged in such behavior at or around the time they were the victim of, or witness the offense they are reporting. (Evid. Code § 647.3.)

Existing law establishes a procedure in which a person may be compelled to testify or produce evidence in a felony case if a person refuses to answer a question or produce evidence of any other kind on the ground that he or she may be incriminated and allows the district attorney or any other prosecuting agency to request an order granting use immunity or transactional immunity to the person compelled to give testimony or produce evidence. (Pen. Code § 1324.)

Existing law establishes a procedure in which a person who refuses to answer a question or produce evidence of any other kind in a misdemeanor case on the ground that he may be incriminated, may agree to testify voluntarily in exchange for immunity from prosecution. (Pen. Code § 1324.1.)

This bill states that the testimony of a victim or witness in a felony prosecution for assault or burglary with the intent to commit specified sex crimes, sexual battery, rape, statutory rape, sodomy, oral copulation, lewd or lascivious acts, sexual penetration, that the victim or witness, at or around the time of the sex crime unlawfully possessed or used a control substance or alcohol is inadmissible in a separate prosecution of that victim or witness to prove illegal possession or use of that controlled substance or alcohol.

This bill specifies that evidence that the testifying witness unlawfully possessed or used a controlled substance or alcohol is not excluded from use in the felony prosecution for a violation or attempted violation of specified sex crimes.

This bill specifies that evidence that a witness received use immunity for testimony is not excluded in the felony prosecution of a violation or attempted violation of specified sex crimes.

COMMENTS

1. Need for This Bill

According to the author of this bill:

> A report by the White House Task Force to Protect Students from Sexual Assault confirm that liability for illegal consumption of alcohol and drugs can keep victims from reporting sexual assault. Higher education institutions nationwide, including the University of California system, utilize amnesty clauses to encourage college students to report sexual misconduct. These amnesty clauses provide limited immunity to individuals coming forward with a complaint. California should expand this concept to apply to all victims of sexual assault. Every victim deserves to come forward without fear of being found liable for minor violations of underage drinking or drug use. Providing victims with amnesty will help law enforcement prosecute perpetrators of sexual assault and increase overall public safety. AB 1927 will ensure that sexual assault survivors receive the justice they deserve.

2. Granting Immunity in Criminal Proceedings

Existing law provides for the granting of immunity upon the petition of the prosecution and a finding by the court that such immunity is in the public interest. A victim or witness may be granted immunity for their testimony in a felony prosecution through a process known as "compelled testimony." (Pen. Code § 1324.) In that procedure, the victim or witness must first formally refuse to testify or provide evidence, invoking the rationale that doing so may incriminate them. The court can then "compel" the person to testify, granting immunity from prosecution for their statements and evidence in the process. A grant of immunity means that the prosecution cannot use the witness' testimony again them in any future prosecution.

According to the proponents of this bill, the existing procedure is often traumatic and complicated for victims and witnesses, who have often already been traumatized by virtue of being the witness to, or victim of, a sexual assault. Instead of requiring a victim of specified felony sexual assault to undergo the process of compelled testimony, this bill would provide that the testimony of a victim or witness that states that the victim or witness unlawfully possessed or used a controlled substance or alcohol is inadmissible in a separate prosecution of that victim or witness to prove illegal possession or use of that controlled substance or alcohol unless that prosecution is for one of the specified felony sexual assault offenses specified. This bill also states that evidence that the witness or victim received such immunity for their testimony is not excluded in a felony prosecution for one of the specified sexual assault offenses.

3. Underreporting of Sexual Assault

Various reports indicate that sexual assault is severely underreported. The California Coalition Against Sexual Assault (CALCASA) publishes an annual report entitled the "Cost and Consequences of Sexual Assault in California." That report purports to track the instances of self-reported sexual assaults against the number of sexual assaults that are reported to law enforcement. (CALCASA, Feb. 2018, https://www.calcasa.org/wp-content/uploads/2018/02/CALCASA_CCofSV_FINALSpreads_2018.pdf, [as of July 3, 2020].) One of the conclusions drawn from the report is that the discrepancy in the number of self-reported sexual assaults versus the number of reports to law enforcement "highlight the extensive underreporting of sexual violence in California crime reports." (*Id*. at 12.)

In 2014, President Obama issued a memorandum directing the Office of the Vice President and the White House Council on Women and Girls to lead an interagency effort to address campus rape and sexual assault. (White House Press Release, Jan. 22, 2014, *Memorandum -- Establishing a White House Task Force to Protect Students from Sexual Assault*, https://obamawhitehouse.archives.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a [as of July 3, 2020].) The White House Task Force to Protect Students from Sexual Assault ("White House Task Force") was then established.

The White House Task Force released its first report in 2014, finding that sexual assault on campus is "chronically underreported" and that only 2% of sexual assault survivors who were incapacitated from drugs or alcohol at the time of the assault report the incident to law enforcement. (*Not Alone: The First Report of the White House Task Force*, Apr. 2014, at page 7, see https://www.justice.gov/archives/ovw/page/file/905942/download, [as of July 3, 2020].) The reporting rate for forcible rape was slightly higher, but still quite low, at 13%. (*Ibid*.)

The fact that a victim may have used or possessed alcohol or drugs at or around the time of the sexual assault may be a reason why many witnesses are unwilling to come forward with allegations and evidence about a sexual offense. As part of its report, the White House Task Force created a checklist for Campus Sexual Misconduct Policies which included an amnesty policy for drug and alcohol use in specific situations. (*Checklist for Campus Sexual Misconduct Policies*, White House Task Force, Apr. 2014, at page 5, https://www.justice.gov/archives/ovw/page/file/910271/download, [as of July 3, 2020].)

Under the provisions of this bill, an amnesty-like policy would be adopted for criminal prosecutions. Specifically, any victim or witness to a felony-level sexual assault would be allowed to testify in regards to that assault without fear that their statements could be used in a separate prosecution to prove drug or alcohol use or possession, except when the separate prosecution involves a felony sexual assault. This statutory grant of immunity may encourage victims and witnesses to be more willing to report and aid in the prosecution of cases that involve serious allegations of sex crimes.

4. Similar Legislation

In recent years, the Legislature has passed similar laws – AB 2243 (Friedman) Chapter 27, Statutes of 2018 and SB 233 (Wiener), Chapter 141, Statutes of 2019 – that prohibit the use of testimony and evidence of low-level controlled substance and prostitution offenses when the person has shared that testimony or evidence in order to aid the prosecution of a more serious violation of law.

5. Proposition 8, Right to Truth-in-Evidence

In 1982, California voters approved Proposition 8, which included a provision known as the "Right to Truth-in-Evidence." The Right to Truth-In-Evidence is codified in the California Constitution, and stands for the principle that no relevant evidence may be excluded from a criminal proceeding, with specific exceptions that were already in place at the time Proposition 8 was adopted. (Cal. Const., art. I, § 28(f)(2).) Additionally, the Right to Truth-In-Evidence provision required a 2/3 vote in both houses in order to create any new exceptions to the rule that relevant evidence not be excluded in a criminal proceeding.

Consistent with that provision, this bill has been marked as a 2/3 vote because it could potentially exclude relevant evidence from being presented in a prosecution for a use/possession of drugs or alcohol case, if the defendant had previously testified in a separate case for a sex offense about their drug or alcohol use or possession.

6. Argument in Support

According to the San Diego County District Attorney's Office, a co-sponsor of this bill:

> AB 1927 will provide victims and witnesses with use immunity in sexual assault cases where their testimony about their illicit drug use or underage drinking at the time of the crime exposes them to criminal liability. AB 1927 creates an "amnesty clause" by adding 1324.2 to the Penal Code. The addition will provide that the testimonial evidence given by a victim or witness of a sexual assault who possessed or used a controlled substance or alcohol at the time of the crime would

be inadmissible in a separate prosecution of that victim or witness to prove criminal liability for the unlawful possession or use of a controlled substance.

AB 1927 will fix the current contradiction in California law. Penal Code section 1324 is the only formal legal process to grant use immunity to a victim who has potential criminal liability. In order to utilize Penal Code section 1324 to grant immunity to the sexual assault victim, the victim must be compelled by the court to testify. The notion that a sexual assault survivor would be compelled to testify in a sexual assault case runs contrary to the rights bestowed upon sexual assault victims under Penal Code section 680.2(a)(1); This section informs sexual assault victims that they are "not required to participate in the criminal justice system." In practice, when a sexual assault victim has potential criminal liability for the use of drugs or alcohol, the court will also appoint a defense attorney to advise and represent the sexual assault victim. The effect of having a lawyer appointed and being compelled by a judge to testify increases trauma to the victim as a potential criminal.

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