

FILED
2013 APR 29 PM 5:10

WEST VIRGINIA LEGISLATURE
EIGHTY-FIRST LEGISLATURE
REGULAR SESSION, 2013

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ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 461

(SENATORS COOKMAN, BEACH, FITZSIMMONS, D. HALL,
JENKINS, LAIRD, WILLIAMS, UNGER, KESSLER (MR. PRESIDENT),
STOLLINGS, CHAFIN, MILLER, SNYDER, PLYMALE AND PALUMBO,
ORIGINAL SPONSORS)

[PASSED APRIL 13, 2013; IN EFFECT NINETY DAYS FROM PASSAGE.]

SB461

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COMMITTEE SUBSTITUTE
FOR

OFFICE OF THE
SECRETARY OF STATE

Senate Bill No. 461

(SENATORS COOKMAN, BEACH, FITZSIMMONS, D. HALL, JENKINS,
LAIRD, WILLIAMS, UNGER, KESSLER (MR. PRESIDENT),
STOLLINGS, CHAFIN, MILLER, SNYDER, PLYMALE AND PALUMBO,
original sponsors)

[Passed April 13, 2013; in effect ninety days from passage.]

AN ACT to amend and reenact §62-6B-2, §62-6B-3 and §62-6B-4 of the Code of West Virginia, 1931, as amended, all relating to child witnesses; allowing for the consideration of testimony by video; increasing the age for which the court may consider allowing for the testimony of a child witness by closed-circuit television for children under the age of sixteen; qualifications of experts which may be appointed to assist the court when reviewing associated motions; and adding to the factors to be considered by the court with regard to associated motions.

Be it enacted by the Legislature of West Virginia:

That §62-6B-2, §62-6B-3 and §62-6B-4 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 6B. PROTECTION AND PRESERVATION OF STATEMENTS AND TESTIMONY OF CHILD WITNESS.

§62-6B-2. Definitions.

1 For the purposes of this article, the words or terms
2 defined in this section, and any variation of those words or
3 terms required by the context, have the meanings ascribed to
4 them in this section. These definitions are applicable unless
5 a different meaning clearly appears from the context.

6 (1) "Child witness" means a person under the age of
7 sixteen years of age who is or will be called to testify in a
8 criminal matter concerning an alleged violation of the
9 provisions of sections three, four, five and seven, article
10 eight-b, chapter sixty-one of this code in which the child is
11 the alleged victim.

12 (2) "Live, closed-circuit television" means a simultaneous
13 transmission, by closed-circuit television or other electronic
14 means, between the courtroom and the testimonial room.

15 (3) "Operator" means the individual authorized by the
16 court to operate the closed-circuit television equipment used
17 in accordance with the provisions of this article.

18 (4) "Testimonial room" means a room within the
19 courthouse other than the courtroom from which the
20 testimony of a child witness or the defendant is transmitted to
21 the courtroom by means of live, closed-circuit television.

**§62-6B-3. Findings of fact required for taking testimony of
child witness by closed-circuit television;
considerations for court.**

1 (a) Upon a written motion filed by the prosecuting
2 attorney, the child's attorney or the child's guardian ad litem,
3 and upon findings of fact determined pursuant to subsection
4 (b) of this section, a circuit court may order that the testimony
5 of a child witness may be taken at a pretrial proceeding or at
6 trial through the use of live, closed-circuit television.

7 (b) Prior to ordering that the testimony of a child witness
8 may be taken through the use of live, closed-circuit
9 television, the circuit court must find by clear and convincing
10 evidence, after conducting an evidentiary hearing on this
11 issue, that:

12 (1) The child is an otherwise competent witness;

13 (2) That, absent the use of live, closed-circuit television
14 the child witness will be unable to testify due solely to being
15 required to be in the physical presence of the defendant while
16 testifying;

17 (3) The child witness can only testify if live, two-way
18 closed-circuit television is used in the trial; and

19 (4) That the state's ability to proceed against the
20 defendant without the child witness' live testimony would be
21 substantially impaired or precluded.

22 (c) The court shall consider the following factors in
23 determining the necessity of allowing a child witness to
24 testify by the use of live, closed-circuit television:

25 (1) The age and maturity of the child witness;

26 (2) The facts and circumstances of the alleged offense;

27 (3) The necessity of the child's live testimony to the
28 prosecution's ability to proceed as well as any prejudice to
29 the defendant by allowing testimony through closed-circuit
30 television;

31 (4) Whether or not the facts of the case involve the
32 alleged infliction of bodily injury to the child witness or the
33 threat of bodily injury to the child or another; and

34 (5) Any mental or physical handicap of the child witness.

35 (d) In determining whether to allow a child witness to
36 testify through live, closed-circuit television the court shall
37 appoint a psychiatrist or a licensed psychologist with at least
38 five years clinical experience who shall serve as an advisor or
39 friend of the court to provide the court with an expert opinion
40 as to whether, to a reasonable degree of professional
41 certainty, the child witness will suffer severe emotional harm,
42 be unable to testify based solely on being in the physical
43 presence of the defendant while testifying and that the child
44 witness does not evidence signs of being subjected to undue
45 influence or coercion. The opinion of the psychiatrist or
46 licensed psychologist shall be filed with the circuit court at
47 least thirty days prior to the final hearing on the use of live,
48 closed-circuit television and the defendant shall be allowed
49 to review the opinion and present evidence on the issue by
50 the use of an expert or experts or otherwise.

**§62-6B-4. Procedures required for taking testimony of child
witness by closed-circuit television; election of
defendant; jury instruction; sanction for failure to
follow procedures; additional accommodation
options; recordings and confidentiality.**

1 (a) If the court determines that the use of live, two-way
2 closed-circuit testimony is necessary and orders its use the
3 defendant may, at any time prior to the child witness being
4 called, elect to absent himself from the courtroom during the
5 child witness' testimony. If the defendant so elects the child
6 shall be required to testify in the courtroom.

7 (b)(1) If live, closed-circuit television is used in the
8 testimony of the child witness, he or she shall be taken into
9 the testimonial room and be televised live, by closed-circuit
10 equipment to the view of the defendant, counsel, the court
11 and, if applicable, the jury. The projected image of the

12 defendant shall be visible for child witness to view if he or
13 she chooses to do so and the view of the child witness
14 available to those persons in the courtroom shall include a
15 full body view. Only the prosecuting attorney, the attorney
16 for the defendant, and the operator of the equipment may be
17 present in the room with the child witness during testimony.
18 Only the court, the prosecuting attorney and the attorney for
19 the defendant may question the child. In pro se proceedings,
20 the court may modify the provisions of this subdivision
21 relating to the role of the attorney for the defendant to allow
22 the pro se defendant to question the child witness in such a
23 manner as to cause as little psychological trauma as possible
24 under the circumstances. The court shall permit the
25 defendant to observe and hear the testimony of the child
26 witness contemporaneous with the taking of the testimony.
27 The court shall provide electronic means for the defendant
28 and the attorney for the defendant to confer confidentially
29 during the taking of the testimony.

30 (2) If the defendant elects to not be physically present in
31 the courtroom during the testimony of the child witness, the
32 defendant shall be taken into the testimonial room and be
33 televised live, by two-way closed-circuit equipment to the
34 view of the finder of fact and others present in the courtroom.
35 The defendant shall be taken to the testimonial room prior to
36 the appearance of the child witness in the courtroom. There
37 shall be made and maintained a recording of the images and
38 sounds of all proceedings which were televised pursuant to
39 this article. While the defendant is in the testimonial room,
40 the defendant shall be permitted to view the live, televised
41 image of the child witness and the image of those other
42 persons in the courtroom whom the court determines the
43 defendant is entitled to view. Only the court, the prosecuting
44 attorney and the attorney for the defendant may question the
45 child. In pro se proceedings, the court may modify the
46 provisions of this subdivision relating to the role of the
47 attorney for the defendant to allow the pro se defendant to

48 question the child witness in such a manner as to cause as
49 little emotional distress as possible under the circumstances.
50 The transmission from the courtroom to the testimonial room
51 shall be sufficient to permit the defendant to observe and hear
52 the testimony of the child witness contemporaneous with the
53 taking of the testimony. No proceedings other than the taking
54 of the testimony of the child witness shall occur while the
55 defendant is outside the courtroom. In the event that the
56 defendant elects that the attorney for the defendant remain in
57 the courtroom while the defendant is in the testimonial room,
58 the court shall provide electronic means for the defendant and
59 the attorney for the defendant to confer confidentially during
60 the taking of the testimony.

61 (c) In every case where the provisions of the article are
62 used, the jury, at a minimum, shall be instructed, unless such
63 instruction is waived by the defendant, that the use of live,
64 closed-circuit television is being used solely for the child's
65 convenience, that the use of the medium cannot as a matter of
66 law and fact be considered as anything other than being for
67 the convenience of the child witness and that to infer
68 anything else would constitute a violation of the oath taken
69 by the jurors.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Rocky Fikens
.....
Member ~~Chairman~~ Senate Committee

Perry Wells
.....
Chairman House Committee

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SECRETARY OF STATE

Originated in the Senate.

In effect ninety days from passage.

Joseph M. Minard
.....
Clerk of the Senate

Supp. S. S.
.....
Clerk of the House of Delegates

Jeffrey Kent
.....
President of the Senate

[Signature]
.....
Speaker of the House of Delegates

The within *is approved* this the *29th*
Day of *April*, 2013.

Carl Roy Tomlin
.....
Governor

PRESENTED TO THE GOVERNOR

APR 26 2013

Time 10:30 am