

1 **ENROLLED**

2 **COMMITTEE SUBSTITUTE**

3 **FOR**

4 **Senate Bill No. 461**

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

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9 [Passed April 13, 2013; in effect ninety days from passage.]
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13 AN ACT to amend and reenact §62-6B-2, §62-6B-3 and §62-6B-4 of the
14 Code of West Virginia, 1931, as amended, all relating to child
15 witnesses; allowing for the consideration of testimony by
16 video; increasing the age for which the court may consider
17 allowing for the testimony of a child witness by closed-
18 circuit television for children under the age of sixteen;
19 qualifications of experts which may be appointed to assist the
20 court when reviewing associated motions; and adding to the
21 factors to be considered by the court with regard to
22 associated motions.

23 *Be it enacted by the Legislature of West Virginia:*

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

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

1 **§62-6B-2. Definitions.**

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

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

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

22 **§62-6B-3. Findings of fact required for taking testimony of child**
23 **witness by closed-circuit television; considerations**
24 **for court.**

25 (a) Upon a written motion filed by the prosecuting attorney,
26 the child's attorney or the child's guardian ad litem, and upon
27 findings of fact determined pursuant to subsection (b) of this
28 section, a circuit court may order that the testimony of a child

1 witness may be taken at a pretrial proceeding or at trial through
2 the use of live, closed-circuit television.

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

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

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

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

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

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

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

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

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

25 (4) Whether or not the facts of the case involve the alleged
26 infliction of bodily injury to the child witness or the threat of
27 bodily injury to the child or another; and

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

1 (d) In determining whether to allow a child witness to testify
2 through live, closed-circuit television the court shall appoint a
3 psychiatrist or a licensed psychologist with at least five years
4 clinical experience who shall serve as an advisor or friend of the
5 court to provide the court with an expert opinion as to whether, to
6 a reasonable degree of professional certainty, the child witness
7 will suffer severe emotional harm, be unable to testify based
8 solely on being in the physical presence of the defendant while
9 testifying and that the child witness does not evidence signs of
10 being subjected to undue influence or coercion. The opinion of the
11 psychiatrist or licensed psychologist shall be filed with the
12 circuit court at least thirty days prior to the final hearing on
13 the use of live, closed-circuit television and the defendant shall
14 be allowed to review the opinion and present evidence on the issue
15 by the use of an expert or experts or otherwise.

16 **§62-6B-4. Procedures required for taking testimony of child**
17 **witness by closed-circuit television; election of**
18 **defendant; jury instruction; sanction for failure to**
19 **follow procedures; additional accommodation options;**
20 **recordings and confidentiality.**

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

27 (b) (1) If live, closed-circuit television is used in the
28 testimony of the child witness, he or she shall be taken into the

1 testimonial room and be televised live, by closed-circuit equipment
2 to the view of the defendant, counsel, the court and, if
3 applicable, the jury. The projected image of the defendant shall
4 be visible for child witness to view if he or she chooses to do so
5 and the view of the child witness available to those persons in the
6 courtroom shall include a full body view. Only the prosecuting
7 attorney, the attorney for the defendant, and the operator of the
8 equipment may be present in the room with the child witness during
9 testimony. Only the court, the prosecuting attorney and the
10 attorney for the defendant may question the child. In pro se
11 proceedings, the court may modify the provisions of this
12 subdivision relating to the role of the attorney for the defendant
13 to allow the pro se defendant to question the child witness in such
14 a manner as to cause as little psychological trauma as possible
15 under the circumstances. The court shall permit the defendant to
16 observe and hear the testimony of the child witness contemporaneous
17 with the taking of the testimony. The court shall provide
18 electronic means for the defendant and the attorney for the
19 defendant to confer confidentially during the taking of the
20 testimony.

21 (2) If the defendant elects to not be physically present in
22 the courtroom during the testimony of the child witness, the
23 defendant shall be taken into the testimonial room and be televised
24 live, by two-way closed-circuit equipment to the view of the finder
25 of fact and others present in the courtroom. The defendant shall
26 be taken to the testimonial room prior to the appearance of the
27 child witness in the courtroom. There shall be made and maintained
28 a recording of the images and sounds of all proceedings which were

1 televised pursuant to this article. While the defendant is in the
2 testimonial room, the defendant shall be permitted to view the
3 live, televised image of the child witness and the image of those
4 other persons in the courtroom whom the court determines the
5 defendant is entitled to view. Only the court, the prosecuting
6 attorney and the attorney for the defendant may question the child.
7 In pro se proceedings, the court may modify the provisions of this
8 subdivision relating to the role of the attorney for the defendant
9 to allow the pro se defendant to question the child witness in such
10 a manner as to cause as little emotional distress as possible under
11 the circumstances. The transmission from the courtroom to the
12 testimonial room shall be sufficient to permit the defendant to
13 observe and hear the testimony of the child witness contemporaneous
14 with the taking of the testimony. No proceedings other than the
15 taking of the testimony of the child witness shall occur while the
16 defendant is outside the courtroom. In the event that the
17 defendant elects that the attorney for the defendant remain in the
18 courtroom while the defendant is in the testimonial room, the court
19 shall provide electronic means for the defendant and the attorney
20 for the defendant to confer confidentially during the taking of the
21 testimony.

22 (c) In every case where the provisions of the article are
23 used, the jury, at a minimum, shall be instructed, unless such
24 instruction is waived by the defendant, that the use of live,
25 closed-circuit television is being used solely for the child's
26 convenience, that the use of the medium cannot as a matter of law
27 and fact be considered as anything other than being for the
28 convenience of the child witness and that to infer anything else

1 would constitute a violation of the oath taken by the jurors.