

1 COMMITTEE SUBSTITUTE

2 FOR

3 **H. B. 2828**

4
5 (By Delegates Cowles, Storch, Miller, Border, Shott and Upson)

6
7 (Originating in the House Committee on the Judiciary)

8 [February 24, 2015]

9
10 A BILL to amend and reenact §62-6B-2, §62-6B-3 and §62-6B-4 of the Code of West Virginia,
11 1931, as amended, all relating to modifying the requirements that allow a child witness to
12 testify by closed circuit television.

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

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

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

18 **§62-6B-2. Definitions.**

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

22 (1) "Child witness" means a person under the age of sixteen ~~years of age~~, or who has an

1 intellectual disability that causes the person to function under the age of sixteen, who is or will be
2 called to testify in a criminal matter concerning an alleged violation of the provisions of ~~sections~~
3 ~~three, four, five and seven,~~ article eight-b, article eight-c, or article eight-d of chapter sixty-one of
4 this code in which the child is the alleged victim.

5 (2) "Live, closed-circuit television" means a simultaneous transmission, by one-way
6 closed-circuit television or other electronic means, between the courtroom and the testimonial room,
7 such that the witness is visible on monitors in the courtroom, but the courtroom and the defendant
8 are not visible to the witness in the testimonial room.

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

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

14 **§62-6B-3. Findings of fact required for taking testimony of child witness by closed-circuit**
15 **television; considerations for court.**

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

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

1 (1) The child ~~is an otherwise competent~~ witness is otherwise competent to testify;

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

4 The use of live, closed circuit television is necessary to protect the welfare of the particular
5 child witness who seeks to testify;

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

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

10 (3) Requiring the child witness to testify in the physical presence of the defendant would
11 result in substantial emotional distress to the child which would impair the ability of the child
12 witness to truthfully and effectively communicate; and

13 (4) The emotional distress which would be suffered by the child witness in the presence of
14 the defendant is more than nervousness, excitement, or general reluctance to testify.

15 (c) The court ~~shall~~ may additionally consider the following factors in determining the
16 necessity of allowing a child witness to testify by the use of live, closed-circuit television:

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

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

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

21 (4) ~~Whether or not the facts of the case involve the alleged infliction of bodily injury to the~~
22 ~~child witness or the threat of bodily injury to the child or another; and~~

1 ~~(5)~~ (3) Any mental or physical handicap of the child witness.

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

15 ~~(d)~~ (e) Not less than thirty days prior to the evidentiary hearing provided for in subsection
16 (b) above, the expert witness appointed by the court shall file with the court a written report outlining
17 the substance of the facts and opinions to which such expert intends to testify, together with a
18 summary of the grounds for each opinion. Failure to file such report within the time provided for
19 does not constitute grounds for a denial of the motion for taking the testimony of the child witness
20 by closed-circuit television, but may, in the discretion of the court, constitute grounds for a
21 continuance of the evidentiary hearing.

22 **§62-6B-4. Procedures required for taking testimony of child witness by closed-circuit**

1 **television; election of defendant; jury instruction; sanction for failure to follow**
2 **procedures; additional accommodation options; recordings and confidentiality.**

3 (a) If live, closed-circuit television is used in the testimony of the child witness, he or she
4 shall be taken into the testimonial room and be televised live, by closed-circuit equipment to the
5 view of the defendant, counsel, the court and, if applicable, the jury. The live, closed circuit
6 television testimony shall be presented to the jury such that the jury has a clear image of the witness
7 and all counsel present in the testimonial room. The prosecuting attorney, the attorney for the
8 defendant, the attorney for the child and the operator of the equipment may be present in the room
9 with the child witness during testimony. The court may authorize the presence of other persons in
10 the testimonial room upon good cause shown.

11 (b) Only the court, the prosecuting attorney and the attorney for the defendant may question
12 the child. In proceedings where the defendant has elected to proceed *pro se*, the court shall appoint
13 an attorney to represent the defendant for the limited purpose of questioning the child witness. The
14 court shall permit the defendant to observe and hear the testimony of the child witness
15 contemporaneous with the taking of the testimony. The court shall provide electronic means for the
16 defendant and the attorney for the defendant to confer confidentially during the taking of the
17 testimony.

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

1 Counsel is prohibited from commenting in the presence of the jury upon the decision to utilize closed
2 circuit television.

3 (d) If the child is a victim, the court shall ensure that all steps necessary to secure the physical
4 safety of the child while in the courtroom, the testimonial room, and during periods of time that the
5 child may spend waiting prior or subsequent to testifying have been taken.

6 (e) The court shall take all steps necessary to ensure that any sensitive information, including
7 address or physical location of the child witness and/or the immediate family of the child witness,
8 remains confidential.

9 (f) The court may, upon motion made by the child's representative or any party to the
10 proceeding and upon a finding by the court that the accommodation will assist the child witness in
11 testifying effectively and that the accommodation will not cause unfair prejudice, grant the following
12 accommodations to a child witness who testifies in court rather than by live, closed circuit television;

13 (1) The court may allow the child witness to have a toy, blanket or similar item in his or her
14 possession while testifying; and

15 (2) The court may designate a support person, who shall be seated in the courtroom, in view
16 of the child witness either at one of the counsel tables, in the first row of seating for the general
17 public or in some other similar seating location. The support person may not provide the child with
18 an answer to any question directed to the child witness during the course of the child's testimony or
19 otherwise prompt the child or influence the testimony of the child witness. If the support person
20 attempts to influence the testimony of the child witness at any time the court may exclude that
21 support person. If the support person does not obscure the child witness from the view of the parties,
22 the judge or the jury, the court may allow the support person to remain in close proximity to the child

1 witness during the child's testimony if:

2 (A) All the parties agree; or

3 (B) The movant proves by clear and convincing evidence that:

4 (i) The child witness in question cannot reliably testify without the support person in his or
5 her presence;

6 (ii) No other alternative to having the support person in his or her presence would allow the
7 child witness to reliably testify; and

8 (iii) The presence of the support person is not likely to prejudice the trier of fact in hearing
9 and evaluating the child witness's testimony.