

# **WEST VIRGINIA LEGISLATURE**

## **2016 REGULAR SESSION**

### **Committee Substitute**

**for**

### **House Bill 4521**

(BY DELEGATES COWLES AND SHOTT)

[Originating in the Committee on the Judiciary;

February 17, 2016.]



1 A BILL to amend and reenact §62-6B-2, §62-6B-3 and §62-6B-4 of the Code of West Virginia,  
2 1931, as amended, all relating to modifying the requirements that allow a child witness to  
3 testify by live, one-way, closed circuit television; defining terms; expanding the allowance  
4 of such closed circuit testimony to other alleged criminal offenses; authorizing use for  
5 persons with certain intellectual disabilities; clarifying the use and requirements of one-  
6 way closed-circuit television; setting forth findings to be made by the circuit court prior to  
7 ordering testimony through live, one-way, closed circuit television; granting the court  
8 discretion to appoint a psychiatrist, licensed psychologist or licensed social worker to  
9 provide an expert opinion regarding the factors and findings to be made by the Court in  
10 deciding whether to order testimony through live, one-way, closed circuit television;  
11 requiring court-appointed expert witness to provide written report within established  
12 deadline; providing for the effect of failure to comply with filing deadline; revising the  
13 procedures required for taking testimony of child witness by live, one-way, closed-circuit  
14 television; setting forth the procedures for testimony by live, one-way, closed-circuit  
15 television; establishing a location for witness testimony and individuals allowed in the  
16 witness room; setting requirements for display in the courtroom; requirements; providing  
17 who may question the child witness and the procedures therefor; providing for requirement  
18 of electronic means for defendant to confer with counsel during the taking of the testimony;  
19 providing for instruction to jury regarding use of live, one-way, closed-circuit television;  
20 authorizing the defendant to waive jury instruction regarding use of live, one-way, closed-  
21 circuit television; prohibiting counsel from making comments in the presence of the jury;  
22 authorizing the court to establish measures for the physical safety of the child witness and  
23 for the confidentiality of sensitive information; authorizing the court to allow  
24 accommodations for child witness testimony in court rather than by live, one-way, closed-  
25 circuit television; authorizing the allowance of a toy, blanket or similar item to be in  
26 possession of child witness while testifying; authorizing the allowance of a designated

27 support person and seating of such support person in the courtroom; and providing  
28 requirements for allowance of a designated support person by motion.

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

1 That §62-6B-2, §62-6B-3 and §62-6B-4 of the Code of West Virginia, 1931, as amended,  
2 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 defined in this section, and any variation  
2 of those words or terms required by the context, have the meanings ascribed to them in this  
3 section. These definitions are applicable unless a different meaning clearly appears from the  
4 context.

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

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

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

16 (4) "Testimonial room" means a room within the courthouse other than the courtroom from  
17 which the testimony of a child witness ~~or the defendant~~ is transmitted to the courtroom by means  
18 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~~ of the prosecuting attorney, the child's attorney or the  
2 child's guardian ad litem, and upon findings of fact determined pursuant to subsection (b) of this  
3 section, a circuit court may order that the testimony of a child witness may be taken at a pretrial  
4 proceeding or at trial through the use of live, closed-circuit television.

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

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

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

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

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

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

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

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

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

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

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

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

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

30 ~~(5) (3) Any mental or physical handicap of the child witness.~~

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

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

**§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 closed-circuit testimony is~~  
2 ~~necessary and orders its use the defendant may, at any time prior to the child witness being~~  
3 ~~called, elect to absent himself from the courtroom during the child witness' testimony. If the~~  
4 ~~defendant so elects the child shall be required to testify in the courtroom.~~

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

19           ~~(2) If the defendant elects to not be physically present in the courtroom during the~~  
20 ~~testimony of the child witness, the defendant shall be taken into the testimonial room and be~~  
21 ~~televised live, by two-way closed-circuit equipment to the view of the finder of fact and others~~  
22 ~~present in the courtroom. The defendant shall be taken to the testimonial room prior to the~~

23 appearance of the child witness in the courtroom. There shall be made and maintained a recording  
24 of the images and sounds of all proceedings which were televised pursuant to this article. While  
25 the defendant is in the testimonial room, the defendant shall be permitted to view the live, televised  
26 image of the child witness and the image of those other persons in the courtroom whom the court  
27 determines the defendant is entitled to view. Only the court, the prosecuting attorney and the  
28 attorney for the defendant may question the child. In pro se proceedings, the court may modify  
29 the provisions of this subdivision relating to the role of the attorney for the defendant to allow the  
30 pro se defendant to question the child witness in such a manner as to cause as little emotional  
31 distress as possible under the circumstances. The transmission from the courtroom to the  
32 testimonial room shall be sufficient to permit the defendant to observe and hear the testimony of  
33 the child witness contemporaneous with the taking of the testimony. No proceedings other than  
34 the taking of the testimony of the child witness shall occur while the defendant is outside the  
35 courtroom. In the event that the defendant elects that the attorney for the defendant remain in the  
36 courtroom while the defendant is in the testimonial room, the court shall provide electronic means  
37 for the defendant and the attorney for the defendant to confer confidentially during the taking of  
38 the testimony.

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

45 (a) If live, closed-circuit television is used in the testimony of the child witness, he or she  
46 shall be taken into the testimonial room and be televised live, by closed-circuit equipment to the  
47 view of the defendant, counsel, the court and, if applicable, the jury. The live, closed circuit  
48 television testimony shall be presented to the jury such that the jury has a clear image of the



49 witness and all counsel present in the testimonial room. The prosecuting attorney, the attorney  
50 for the defendant, the attorney for the child and the operator of the equipment may be present in  
51 the room with the child witness during testimony. The court may authorize the presence of other  
52 persons in the testimonial room upon good cause shown.

53 (b) Only the court, the prosecuting attorney and the attorney for the defendant may  
54 question the child. In proceedings where the defendant has elected to proceed *pro se*, the court  
55 shall appoint an attorney to represent the defendant for the limited purpose of questioning the  
56 child witness. The court shall permit the defendant to observe and hear the testimony of the child  
57 witness contemporaneous with the taking of the testimony. The court shall provide electronic  
58 means for the defendant and the attorney for the defendant to confer confidentially during the  
59 taking of the testimony.

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

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

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

73 (f) The court may, upon motion made by the child's representative or any party to the  
74 proceeding and upon a finding by the court that the accommodation will assist the child witness

75 in testifying effectively and that the accommodation will not cause unfair prejudice, grant the  
76 following accommodations to a child witness who testifies in court rather than by live, closed circuit  
77 television;

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

80 (2) The court may designate a support person, who shall be seated in the courtroom, in  
81 view of the child witness either at one of the counsel tables, in the first row of seating for the  
82 general public or in some other similar seating location. The support person may not provide the  
83 child with an answer to any question directed to the child witness during the course of the child's  
84 testimony or otherwise prompt the child or influence the testimony of the child witness. If the  
85 support person attempts to influence the testimony of the child witness at any time the court may  
86 exclude that support person. If the support person does not obscure the child witness from the  
87 view of the parties, the judge or the jury, the court may allow the support person to remain in close  
88 proximity to the child witness during the child's testimony if:

89 (A) All the parties agree; or

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

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

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

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

NOTE: The purpose of this bill is to modify the requirements that allow a child witness to testify by closed circuit television.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.

§62-6B-4 has been completely rewritten; therefore, it has been completely underscored.