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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

Regular Session, 2001

ENROLLED

Committee Substitute for

SENATE BILL NO. 34

(By Senator Kessler, et al **)**

PASSED April 13, 2001

In Effect 90 days from **Passage**

FILED

2001 MAY -2 A 11: 17

OFFICE WEST VIRGINIA
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ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 34

(SENATORS KESSLER, SHARPE, MINEAR, MCKENZIE,
HUNTER, ROSS, EDGELL, MITCHELL, ANDERSON,
BURNETTE, BOLEY AND ROWE, *original sponsors*)

[Passed April 13, 2001; in effect ninety days from passage.]

AN ACT to amend chapter sixty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article six-b, relating to the protection and preservation of statements and testimony of child witnesses; allowing and providing procedures for taking the testimony of a child witness by using live, two-way closed-circuit television; setting forth legislative findings; defining certain terms; prescribing findings of fact required for taking testimony of child witness through use of live two-way closed-circuit television; describing procedures for taking testimony of child witness; requiring certain jury instructions; and providing for the memorialization of statements made by alleged child victims of sexual assault or sexual abuse.

Be it enacted by the Legislature of West Virginia:

That chapter sixty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article six-b, to read as follows:

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

§62-6B-1. Legislative findings.

1 The Legislature hereby finds that there are rare occasions
2 when the interests of justice cannot be served
3 because a child who is alleged to be the victim of certain
4 offenses is unable to testify while in the physical presence
5 of the defendant in the courtroom.

6 The Legislature further finds that the constitutional
7 right of the accused to be confronted with the witnesses
8 against him or her must be protected and that this constitutional
9 guarantee can be protected while, at the same
10 time, allowing a child to testify outside of the physical
11 presence of a defendant in the courtroom.

12 The Legislature further finds that a child, more so than
13 an adult, may be subject to coercion and pressure by
14 interested adults and the interests of justice would be
15 served by requiring, unless infeasible, memorialization of
16 child victim statements in certain criminal matters.

§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
4 to them in this section. These definitions are applicable
5 unless a different meaning clearly appears from the
6 context.

7 (1) "Child witness" means a person thirteen years of age
8 or less 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
12 victim.

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

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

21 (4) "Testimonial room" means a room within the court-
22 house other than the courtroom from which the testimony
23 of a child witness or the defendant is transmitted to the
24 courtroom by means of live, two-way closed-circuit
25 television.

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

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

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

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

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

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

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

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

51 present evidence on the issue by the use of an expert or
52 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.

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
4 being called, elect to absent himself from the courtroom
5 during the child witness' testimony. If the defendant so
6 elects the child shall be required to testify in the court-
7 room.

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

32 (2) If the defendant elects to not be physically present in
33 the courtroom during the testimony of the child witness,
34 the defendant shall be taken into the testimonial room and
35 be televised live, by two-way closed-circuit equipment to
36 the view of the finder of fact and others present in the
37 courtroom. The defendant shall be taken to the testimo-
38 nial room prior to the appearance of the child witness in
39 the courtroom. There shall be made and maintained a
40 recording of the images and sounds of all proceedings
41 which were televised pursuant to this article. While the
42 defendant is in the testimonial room, the defendant shall
43 be permitted to view the live, televised image of the child
44 witness and the image of those other persons in the
45 courtroom whom the court determines the defendant is
46 entitled to view. Only the court, the prosecuting attorney
47 and the attorney for the defendant may question the child.
48 In pro se proceedings, the court may modify the provisions
49 of this subdivision relating to the role of the attorney for
50 the defendant to allow the pro se defendant to question the
51 child witness in such a manner as to cause as little emo-
52 tional distress as possible under the circumstances. The
53 transmission from the courtroom to the testimonial room
54 shall be sufficient to permit the defendant to observe and
55 hear the testimony of the child witness contemporaneous
56 with the taking of the testimony. No proceedings other
57 than the taking of the testimony of the child witness shall
58 occur while the defendant is outside the courtroom. In the
59 event that the defendant elects that the attorney for the
60 defendant remain in the courtroom while the defendant is
61 in the testimonial room, the court shall provide electronic
62 means for the defendant and the attorney for the defen-
63 dant to confer confidentially during the taking of the
64 testimony.

65 (c) In every case where the provisions of the article are
66 used, the jury, at a minimum shall, be instructed, unless
67 such instruction is waived by the defendant, that the use
68 of live, two-way closed-circuit television is being used
69 solely for the child's convenience, that the use of the

70 medium cannot as a matter of law and fact be considered
71 as anything other than being for the convenience of the
72 child witness and that to infer anything else would
73 constitute a violation of the oath taken by the jurors.

§62-6B-5. Memorialization of statements of certain child witnesses; admissibility; hearing.

1 (a) After the effective date of this section, whenever any
2 law-enforcement officer, physician, psychologist, social
3 worker or investigator, in the course of his or her employ-
4 ment or profession or while engaged in an active criminal
5 investigation as a law-enforcement officer or an agent of
6 a prosecuting attorney, obtains a statement from a child
7 thirteen years of age or younger who is an alleged victim
8 in an investigation or prosecution alleging a violation of
9 the provisions of section three, four, five or seven, article
10 eight-b, chapter sixty-one of this code, he or she shall
11 forthwith make a contemporaneous written notation and
12 recitation of the statement received or obtained. An audio
13 recording or video recording with sound capability of the
14 statement may be used in lieu of the written recitation
15 required by the provisions of this section. Failure to
16 comply with the provisions of this section creates a
17 presumption that the statement is inadmissible. The
18 statement may be admitted if, after a hearing on the
19 matter, the court finds by clear and convincing evidence
20 that the failure to comply with the provisions of this
21 section was a good faith omission and that the content of
22 the proffered statement is an accurate recital of the
23 information provided by the child and is otherwise
24 admissible.

25 (b) The provisions of this section shall not apply to:

26 (1) Persons engaged in investigation pursuant to the
27 provisions of article six or seven, chapter forty-nine of this
28 code;

29 (2) Medical personnel and other persons performing a
30 forensic medical examination of a child who is an alleged
31 victim; and

32 (3) Prosecuting attorneys when counseling with a child
33 in preparation for eliciting the child's testimony in court.

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

[Signature]
.....
Chairman Senate Committee

[Signature]
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

[Signature]
.....
Clerk of the Senate

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

[Signature]
.....
President of the Senate

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

The within *is* approved this the *1st*
Day of *May*, 2001.

[Signature]
.....
Governor

PRESENTED TO THE

GOVERNOR

Date 4/27/01

Time 4:15 pm