S T A T E O F N E W Y O R K

3676

2011-2012 Regular Sessions

I N A S S E M B L Y

January 26, 2011

Introduced by M. of A. GABRYSZAK -- Multi-Sponsored by -- M. of A. ABBATE, BRENNAN, BURLING, CALHOUN, CONTE, CUSICK, DUPREY, GIGLIO, GOTTFRIED, GUNTHER, HAYES, HOOPER, HOYT, JAFFEE, KOLB, MAISEL, McDONOUGH, MILLMAN, MOLINARO, MURRAY, OAKS, PEOPLES-STOKES, PHEFFER, RAIA, REILLY, SCHIMMINGER, SPANO, THIELE, TITONE, TOBACCO, WEISENBERG, ZEBROWSKI -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to authorizing the use of closed-circuit television for vulnerable domestic violence victim witnesses

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Article 65 of the criminal procedure law, as added by chapter 505 of the laws of 1985, subdivision 1 of section 65.00, and subdivision 7 and paragraph (k) of subdivision 10 of section 65.20 as amended by chapter 320 of the laws of 2006, subdivisions 11 and 12 of section 65.20 as amended by chapter 455 of the laws of 1991, subdivision 1 of section 65.10 as amended, subdivision 2 of section 65.20 as added, the opening paragraph of subdivision 10 of section 65.20 as amended, and subdivisions 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of section 65.20 as renumbered by chapter 548 of the laws of 2007, is amended to read as follows:

ARTICLE 65
USE OF CLOSED-CIRCUIT TELEVISION FOR
CERTAIN [CHILD] WITNESSES

Section 65.00 Definitions.
65.10 Closed-circuit television; general rule; declaration of vulnerability.
65.20 Closed-circuit television; procedure for application and grounds for determination.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD05118-01-1

65.30 Closed-circuit television; special testimonial [procedure] PROCEDURES.

S 65.00 Definitions.

As used in this article:

1. "Child witness" means a person fourteen years old or less who is or will be called to testify in a criminal proceeding, other than a grand jury proceeding, concerning an offense defined in article one hundred thirty of the penal law or section 255.25, 255.26 or 255.27 of such law which is the subject of such criminal proceeding.

2. "DOMESTIC VIOLENCE VICTIM WITNESS" MEANS AN INDIVIDUAL WHO IS A VICTIM OF A FAMILY OFFENSE, AS DEFINED IN SUBDIVISION ONE OF SECTION 530.11 OF THIS CHAPTER, OR AN OFFENSE COMMITTED BY A MEMBER OF SUCH INDIVIDUAL'S IMMEDIATE FAMILY AS DEFINED IN SUBDIVISION FOUR OF SECTION 120.40 OF THE PENAL LAW.

3. "Vulnerable [child] witness" means a child witness OR A DOMESTIC VIOLENCE VICTIM WITNESS whom a court has declared to be vulnerable.

[3.] 4. "Testimonial room" means any room, separate and apart from the courtroom, which is furnished comfortably and less formally than a courtroom and from which the testimony of a vulnerable child witness can be transmitted to the courtroom by means of live, two-way closed-circuit television.

[4.] 5. "Live, two-way closed-circuit television" means a simultaneous transmission, by closed-circuit television, or other electronic means, between the courtroom and the testimonial room in accordance with the provisions of section 65.30 OF THIS ARTICLE.

[5.] 6. "Operator" means the individual authorized by the court to operate the closed-circuit television equipment used in accordance with the provisions of this article.

[6.] 7. A person occupies "a position of authority with respect to a child" when he or she is a parent, guardian or other person responsible for the custody or care of [the] A child at the relevant time or is any other person who maintains an ongoing personal relationship with such parent, guardian or other person responsible for custody or care, which relationship involves his or her living, or his or her frequent and repeated presence, in the same household or premises as the child.

S 65.10 Closed-circuit television; general rule; declaration of vulnerability.

1. A child witness OR A DOMESTIC VIOLENCE VICTIM WITNESS shall be declared vulnerable when the court, in accordance with the provisions of section 65.20 OF THIS ARTICLE, determines by clear and convincing evidence that it is likely that such child witness OR SUCH DOMESTIC VIOLENCE VICTIM WITNESS will suffer serious mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television and that the use of such live, two-way closed-circuit television will diminish the likelihood or extent of, such harm.

2. When the court declares a child witness OR A DOMESTIC VIOLENCE VICTIM WITNESS to be vulnerable, it shall, except as provided in subdivision four of section 65.30 OF THIS ARTICLE, authorize the taking of the testimony of the vulnerable [child] witness from the testimonial room by means of live, two-way closed-circuit television. Under no circumstances shall the provisions of this article be construed to authorize a closed-circuit television system by which events in the courtroom are not transmitted to the testimonial room during the testimony of the vulnerable [child] witness.

3. Nothing [herein] IN THIS ARTICLE shall be [contrued] CONSTRUED to preclude the court from exercising its power to close the courtroom or from exercising any authority it otherwise may have to protect the well-being of a witness and the rights of the defendant.

S 65.20 Closed-circuit television; procedure for application and grounds for determination.

1. Prior to the commencement of a criminal proceeding[;], other than a grand jury proceeding, either party may apply to the court for an order declaring that a child witness OR A DOMESTIC VIOLENCE VICTIM WITNESS is vulnerable.

2. A child witness OR A DOMESTIC VIOLENCE VICTIM WITNESS should be declared vulnerable when the court, in accordance with the provisions of this section, determines by clear and convincing evidence that the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS would suffer serious mental or emotional harm that would substantially impair the child witness' OR THE DOMESTIC VIOLENCE VICTIM WITNESS' ability to communicate with the finder of fact without the use of live, two-way closed-circuit television.

3. A motion pursuant to subdivision one of this section must be made in writing at least eight days before the commencement of trial or other criminal proceeding upon reasonable notice to the other party and with an opportunity to be heard.

4. The motion papers must state the basis for the motion and must contain sworn allegations of fact which, if true, would support a determination by the court that the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS is vulnerable. Such allegations may be based upon the personal knowledge of the deponent or upon information and belief, provided that, in the latter event, the sources of such information and the grounds for such belief are stated.

5. The answering papers may admit or deny any of the alleged facts and may, in addition, contain sworn allegations of fact relevant to the motion, including the rights of the defendant, the need to protect the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS and the integrity of the truth-finding function of the trier of fact.

6. Unless all material facts alleged in support of the motion made pursuant to subdivision one of this section are conceded, the court shall, in addition to examining the papers and hearing oral argument, conduct an appropriate hearing for the purpose of making findings of fact essential to the determination of the motion. Except as provided in subdivision [six] SEVEN of this section, it may subpoena or call and examine witnesses, who must either testify under oath or be permitted to give unsworn testimony pursuant to subdivision two of section 60.20 OF THIS ARTICLE and must authorize the attorneys for the parties to do the same.

7. Notwithstanding any other provision of law, the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS who is alleged to be vulnerable may not be compelled to testify at such hearing or to submit to any psychological or psychiatric examination. The failure of the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS to testify at such hearing shall not be a ground for denying a motion made pursuant to subdivision one of this section. Prior statements made by the child witness relating to any allegations of conduct constituting an offense defined in article one hundred thirty of the penal law or incest as defined in section 255.25, 255.26 or 255.27 of such law, or PRIOR STATEMENTS MADE BY THE CHILD WITNESS OR THE DOMESTIC VIOLENCE VICTIM WITNESS RELATING to any allegation of words or conduct constituting an attempt to prevent, impede or

deter [the child] SUCH witness from cooperating in the investigation or prosecution of the offense shall be admissible at such hearing, provided, however, that a declaration that a child witness OR A DOMESTIC VIOLENCE VICTIM WITNESS is vulnerable may not be based solely upon such prior statements.

8. (a) Notwithstanding any of the provisions of article forty-five of the civil practice law and rules, any physician, psychologist, nurse or social worker who has treated a child witness OR A DOMESTIC VIOLENCE VICTIM WITNESS may testify at a hearing conducted pursuant to subdivision [five] SIX of this section concerning the treatment of such child witness OR SUCH DOMESTIC VIOLENCE VICTIM WITNESS as such treatment relates to the issue presented at the hearing, provided that any otherwise applicable statutory privileges concerning communications between the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS and such physician, psychologist, nurse or social worker in connection with such treatment shall not be deemed waived by such testimony alone, except to the limited extent of permitting the court alone to examine in camera reports, records or documents, if any, prepared by such physician, psychologist, nurse or social worker. If upon such examination the court determines that such reports, records or documents, or any one or portion thereof, contain information material and relevant to the issue of whether the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS is a vulnerable [child] witness, the court shall disclose such information to both the attorney for the defendant and the district attorney.

(b) At any time after a motion has been made pursuant to subdivision one of this section, upon the demand of the other party the moving party must furnish the demanding party with a copy of any and all of such records, reports or other documents in the possession of such other party and must, in addition, supply the court with a copy of all such reports, records or other documents which are the subject of the demand. At any time after a demand has been made pursuant to this paragraph, the moving party may demand that property of the same kind or character in possession of the party that originally made such demand be furnished to the moving party and, if so furnished, be supplied, in addition, to the court.

9. (a) Prior to the commencement of the hearing conducted pursuant to subdivision five of this section, the district attorney shall, subject to a protective order, comply with the provisions of subdivision one of section 240.45 of this chapter as they concern any witness whom the district attorney intends to call at the hearing and the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS.

(b) Before a defendant calls a witness at such hearing, he or she must, subject to a protective order, comply with the provisions of subdivision two of section 240.45 of this chapter as they concern all the witnesses the defendant intends to call at such hearing.

10. The court may consider, in determining whether there are factors which would cause the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS to suffer serious mental or emotional harm, a finding that any one or more of the following circumstances have been established by clear and convincing evidence:

(a) The manner of the commission of the offense of which the defendant is accused was particularly heinous or was characterized by aggravating circumstances.

(b) The child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS is particularly young or otherwise particularly subject to psychological

harm on account of a physical or mental condition which existed before the alleged commission of the offense.

(c) At the time of the alleged offense, the defendant occupied a position of authority with respect to the child witness.

(d) The offense or offenses charged were part of an ongoing course of conduct committed by the defendant against the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS over an extended period of time.

(e) A deadly weapon or dangerous instrument was allegedly used during the commission of the crime.

(f) The defendant has inflicted serious physical injury upon the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS.

(g) A threat, express or implied, of physical violence to the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS, or a third person if [the child] SUCH witness were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer or peace officer concerning the incident has been made by or on behalf of the defendant.

(h) A threat, express or implied, of the incarceration of a parent or guardian of the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS, the removal of the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS from the family or the dissolution of the family of the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS if [the child] SUCH witness were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer or peace officer concerning the incident has been made by or on behalf of the defendant.

(i) A witness other than the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS has received a threat of physical violence directed at such witness or to a third person by or on behalf of the defendant.

(j) The defendant, at the time of the inquiry, (i) is living in the same household with the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS, (ii) has ready access to the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS or (iii) is providing substantial financial support for the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS.

(k) The child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS has previously been the victim of an offense defined in article one hundred thirty of the penal law or incest as defined in section 255.25, 255.26 or 255.27 of such law.

(l) According to expert testimony, the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS would be particularly [suceptible] SUSCEPTIBLE to psychological harm if required to testify in open court or in the physical presence of the defendant.

11. Irrespective of whether a motion was made pursuant to subdivision one of this section, the court, at the request of either party or on its own motion, may decide that a child witness OR A DOMESTIC VIOLENCE VICTIM WITNESS may be vulnerable based on its own observations that a child witness OR A DOMESTIC VIOLENCE VICTIM WITNESS who has been called to testify at a criminal proceeding is suffering severe mental or emotional harm and therefore is physically or mentally unable to testify or to continue to testify in open court or in the physical presence of the defendant and that the use of live, two-way closed-circuit television is necessary to enable [the child] SUCH witness to testify. If the court so decides, it must conduct the same hearing that subdivision [five] SIX of this section requires when a motion is made pursuant to subdivision one of this section, and it must make findings of fact pursuant to subdivisions [nine and eleven] TEN AND TWELVE of this

section, before determining that the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS is vulnerable.

12. In deciding whether a child witness OR A DOMESTIC VIOLENCE VICTIM WITNESS is vulnerable, the court shall make findings of fact which reflect the causal relationship between the existence of any one or more of the factors set forth in subdivision [nine] TEN of this section or other relevant factors which the court finds are established and the determination that the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS is vulnerable. If the court is satisfied that the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS is vulnerable and that, under the facts and circumstances of the particular case, the defendant's constitutional rights to an impartial jury or of confrontation will not be impaired, it may enter an order granting the application for the use of live, two-way closed-circuit television.

13. When the court has determined that a child witness OR A DOMESTIC VIOLENCE VICTIM WITNESS is a vulnerable [child] witness, it shall make a specific finding as to whether placing the defendant and the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS in the same room during the testimony of the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS will contribute to the likelihood that [the child] SUCH witness will suffer severe mental or emotional harm. If the court finds that placing the defendant and the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS in the same room during the testimony of the child witness OR THE DOMESTIC VIOLENCE VICTIM WITNESS will contribute to the likelihood that [the child] SUCH witness will suffer severe mental or emotional harm, the order entered pursuant to subdivision [eleven] TWELVE of this section shall direct that the defendant remain in the courtroom during the testimony of the vulnerable [child] witness.

S 65.30 Closed-circuit television; special testimonial procedures.

1. When the court has entered an order pursuant to section 65.20 OF THIS ARTICLE, the testimony of the vulnerable [child] witness shall be taken in the testimonial room and the image and voice of the vulnerable [child] witness, as well as the image of all other persons other than the operator present in the testimonial room, shall be transmitted live by means of closed-circuit television to the courtroom. The courtroom shall be equipped with monitors sufficient to permit the judge, jury, defendant and attorneys to observe the demeanor of the vulnerable [child] witness during his or her testimony. Unless the courtroom has been closed pursuant to court order, the public shall also be permitted to hear the testimony and view the image of the vulnerable [child] witness.

2. In all instances, the image of the jury shall be simultaneously transmitted to the vulnerable [child] witness in the testimonial room. If the court order issued pursuant to section 65.20 OF THIS ARTICLE specifies that the vulnerable [child] witness shall testify outside the physical presence of the defendant, the image of the defendant and the image and voice of the person examining the vulnerable [child] witness shall also be simultaneously transmitted to the vulnerable [child] witness in the testimonial room.

3. The operator shall place herself or himself and the closed-circuit television equipment in a position that permits the entire testimony of the vulnerable [child] witness to be transmitted to the courtroom but limits the ability of the vulnerable [child] witness to see or hear the operator or the equipment.

4. Notwithstanding any provision of this article, if the court in a particular case involving a vulnerable [child] witness determines that

there is no live, two-way closed-circuit television equipment available in the court or another court in the county or which can be transported to the court from another county or that such equipment, if available, is technologically inadequate to protect the constitutional rights of the defendant, it shall not permit the use of the closed-circuit television procedures authorized by this article.

5. If the order of the court entered pursuant to section 65.20 OF THIS ARTICLE requires that the defendant remain in the courtroom, the attorney for the defendant and the district attorney shall also remain in the courtroom unless the court is satisfied that their presence in the testimonial room will not impede full and private communication between the defendant and his or her attorney and will not encourage the jury to draw an inference adverse to the interest of the defendant.

6. Upon request of the defendant, the court shall instruct the jury that they are to draw no inference from the use of live, two-way closed-circuit television in the examination of the vulnerable [child] witness.

7. The vulnerable [child] witness shall testify under oath except as specified in subdivision two of section 60.20 OF THIS ARTICLE. The examination and cross-examination of the vulnerable [child] witness shall, in all other respects, be conducted in the same manner as if the vulnerable [child] witness had testified in the courtroom.

8. When the testimony of the vulnerable [child] witness is transmitted from the testimonial room into the courtroom, the court stenographer shall record the [textimony] TESTIMONY in the same manner as if the vulnerable [child] witness had testified in the courtroom.

S 2. This act shall take effect immediately and shall apply to all criminal actions and proceedings commenced prior to the effective date of this act but still pending on such date as well as all criminal actions and proceedings commenced on or after such effective date. Provided that the amendments to article 65 of the criminal procedure law, made by section one of this act, shall not affect the expiration and repeal of such article and shall be deemed repealed therewith.