STATE OF NEW YORK

9564

IN SENATE

May 16, 2024

Introduced by Sen. MAY -- read twice and ordered printed, and when printed to be committed 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 sexual assault witnesses

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The criminal procedure law is amended by adding a new article 67 to read as follows:

ARTICLE 67
USE OF CLOSED-CIRCUIT TELEVISION
FOR CERTAIN SEXUAL ASSAULT WITNESSES

Section 67.00 Definitions.
67.10 Closed-circuit television; general rule; declaration of vulnerability.
67.20 Closed-circuit television; procedure for application and grounds for determination.
67.30 Closed-circuit television; special testimonial procedure.

§ 67.00 Definitions.

As used in this article:

1. "Sexual assault witness" means a person fifteen years or older 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. "Vulnerable sexual assault witness" means a sexual assault witness whom a court has declared to be vulnerable.

3. "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 sexual assault witness can be transmitted to the courtroom by means of live, two-way closed-circuit television.

4. "Live, two-way closed-circuit television" means a simultaneous transmission, by closed-circuit television, or other electronic means,

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

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between the courtroom and the testimonial room in accordance with the provisions of section 67.30 of this article.

5. "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. "A position of authority with respect to a witness" means when such person is a parent, guardian or other person responsible for the custody or care of such witness at the relevant time.

7. "Support person" means a parent, guardian, spouse, or family member who is not the defendant in the pending criminal action. A support person shall also include a sexual assault witness's therapist, attorney, or an advocate associated with programs enrolled in the state's victim advocacy program.

§ 67.10 Closed-circuit television; general rule; declaration of vulnerability.

1. A sexual assault witness shall be declared vulnerable when the court, in accordance with the provisions of section 67.20 of this article, determines by clear and convincing evidence that it is likely that such sexual assault 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 sexual assault witness to be vulnerable, it shall, except as provided in subdivision four of section 67.30 of this article, authorize the taking of the testimony of the vulnerable sexual assault 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 sexual assault witness.

3. When a court declares a sexual assault witness to be vulnerable, it shall allow such sexual assault witness to have a support person available to them in the testimonial room. If such sexual assault witness does not have a support person readily available to them, the court shall provide a victim advocate for the sexual assault witness.

4. Nothing herein shall be 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.

§ 67.20 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 sexual assault witness is vulnerable.

2. A sexual assault witness should be declared vulnerable when the court, in accordance with the provisions of this section, determines by clear and convincing evidence that the sexual assault witness would suffer serious mental or emotional harm that would substantially impair the sexual assault 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 sexual assault 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 sexual assault 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 this subdivision, 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 this section and must authorize the attorneys for the parties to do the same.

7. Notwithstanding any other provision of law, the sexual assault 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 sexual assault 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 sexual assault 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 to any allegation of words or conduct constituting an attempt to prevent, impede or deter the sexual assault witness from cooperating in the investigation or prosecution of the offense shall be admissible at such hearing, provided, however, that a declaration that a sexual assault 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 sexual assault witness may testify at a hearing conducted pursuant to subdivision five of this section concerning the treatment of such sexual assault witness as such treatment relates to the issue presented at the hearing, provided that any otherwise applicable statutory privileges concerning communications between the sexual assault 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 sexual assault witness is a sexual assault 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 six of this section, the district attorney shall, subject to a protective order, comply with the provisions of subdivision one of section 245.20 of this chapter as they concern any witness whom the district attorney intends to call at the hearing and the sexual assault witness.

(b) Before a defendant calls a witness at such hearing, such defendant must, subject to a protective order, comply with the provisions of subdivision four of section 245.20 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 sexual assault 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 sexual assault 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 sexual assault witness.

(d) The offense or offenses charged were part of an ongoing course of conduct committed by the defendant against the sexual assault 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 sexual assault witness.

(g) A threat, express or implied, of physical violence to the sexual assault witness or a third person if the sexual assault 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 sexual assault witness, the removal of the sexual assault witness from the family or the dissolution of the family of the sexual assault witness if the sexual assault 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 sexual assault 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 sexual assault witness, (ii) has ready access to

the sexual assault witness or (iii) is providing substantial financial support for the sexual assault witness.

(k) The sexual assault 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 sexual assault witness would be particularly 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 sexual assault witness may be vulnerable based on its own observations that a sexual assault 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 sexual assault witness to testify. If the court so decides, it must conduct the same hearing that subdivision 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 subdivision ten of this section, before determining that the sexual assault witness is vulnerable.

12. In deciding whether a sexual assault 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 ten of this section or other relevant factors which the court finds are established and the determination that the sexual assault witness is vulnerable. If the court is satisfied that the sexual assault 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 sexual assault witness is a vulnerable sexual assault witness, it shall make a specific finding as to whether placing the defendant and the sexual assault witness in the same room during the testimony of the sexual assault witness will contribute to the likelihood that the sexual assault witness will suffer severe mental or emotional harm. If the court finds that placing the defendant and the sexual assault witness in the same room during the testimony of the sexual assault witness will contribute to the likelihood that the sexual assault witness will suffer severe mental or emotional harm, the order entered pursuant to subdivision twelve of this section shall direct that the defendant remain in the courtroom during the testimony of the vulnerable sexual assault witness.

§ 67.30 Closed-circuit television; special testimonial procedure.

1. When the court has entered an order pursuant to section 67.20 of this article, the testimony of the vulnerable sexual assault witness shall be taken in the testimonial room and the image and voice of the vulnerable sexual assault 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 sexual assault witness during such witnesses' 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 sexual assault witness.

2. In all instances, the image of the jury shall be simultaneously transmitted to the vulnerable sexual assault witness in the testimonial room. If the court order issued pursuant to section 67.20 of this article specifies that the vulnerable sexual assault 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 sexual assault witness shall also be simultaneously transmitted to the vulnerable sexual assault witness in the testimonial room.

3. The operator shall place such operator and the closed-circuit television equipment in a position that permits the entire testimony of the vulnerable sexual assault witness to be transmitted to the courtroom but limits the ability of the vulnerable sexual assault 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 sexual assault 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 67.20 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 such defendant's 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 sexual assault witness.

7. The vulnerable sexual assault witness shall testify under oath except as specified in subdivision two of section 60.20 of this title. The examination and cross-examination of the vulnerable sexual assault witness shall, in all other respects, be conducted in the same manner as if the vulnerable sexual assault witness had testified in the courtroom.

8. When the testimony of the vulnerable sexual assault witness is transmitted from the testimonial room into the courtroom, the court stenographer shall record the testimony in the same manner as if the vulnerable sexual assault witness had testified in the courtroom.

§ 2. This act shall take effect immediately.