

HOUSE BILL NO. 491

INTRODUCED BY SINRUD, CLARK, KASTEN, TAYLOR, RIPLEY, LANGE, SONJU, SALES

A BILL FOR AN ACT ENTITLED: "AN ACT PERMITTING TESTIMONY OF A CERTAIN CHILD WITNESS WITNESSES BY TWO-WAY ELECTRONIC AUDIO-VIDEO COMMUNICATION IN CRIMINAL CASES INVOLVING SEXUAL OR VIOLENT OFFENSES; AND REPEALING SECTION 46-16-216, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Definitions. As used in [sections 2 through 4] and this section, the following definitions apply:

(1) "Adult attendant" means an adult who accompanies a child witness throughout the criminal proceeding for the purpose of providing emotional support to the child witness. An individual who is a witness in the criminal proceeding may not ~~be precluded from serving~~ SERVE as an adult attendant.

(2) "Child witness" means an individual who is ~~12;~~

(A) 13 years of age or younger at the time the individual is called as a witness in a criminal proceeding involving a sexual or violent offense; OR

(B) UP TO 18 YEARS OF AGE OR YOUNGER AT THE TIME THAT THE INDIVIDUAL IS CALLED AS A WITNESS IN A CRIMINAL PROCEEDING INVOLVING A SEXUAL OR VIOLENT OFFENSE AND WHO IS AN INDIVIDUAL WITH A DEVELOPMENTAL DISABILITY, AS DEFINED IN 53-20-102.

(3) "Sexual offense" means any violation of or attempt, solicitation, or conspiracy to commit a violation of 45-5-502, 45-5-503, 45-5-504, 45-5-507, 45-5-603, or 45-5-625.

(4) "Violent offense" means any violation of or attempt, solicitation, or conspiracy to commit a violation of 45-5-102, 45-5-103, 45-5-202, 45-5-206, 45-5-210, 45-5-212, 45-5-213, 45-5-302, 45-5-303, 45-5-401, 45-6-103, or 45-9-132.

NEW SECTION. Section 2. Raising issue of testimony of child witness outside presence of defendant -- motion by prosecution OR DEFENSE. (1) Upon a motion by the prosecution OR DEFENSE, a court shall conduct a hearing to consider whether the testimony of a child witness may be taken outside the presence of the defendant and communicated to the courtroom by two-way electronic audio-video communication.

(2) A motion for an order under subsection (1) must be made at ~~least 10 days before the date of the~~

~~proceeding at which the child witness will testify~~ THE OMNIBUS HEARING unless the court finds on the record that the need for an order was not reasonably foreseeable.

NEW SECTION. Section 3. Hearing -- procedure -- evidence that may be received -- protection for child witness. (1) A court shall conduct a hearing on a motion made under ~~[section 1]~~ within 7 days of the filing of the motion [SECTION 2].

(2) The prosecution, IF THE PROSECUTION MADE THE MOTION PURSUANT TO [SECTION 2(1)], OR THE DEFENSE, IF THE DEFENSE MADE THE MOTION PURSUANT TO [SECTION 2(1)], shall present evidence at the hearing made on the motion to prove the need for an order under ~~[section 2 4]~~.

(3) In ruling on the motion, the court shall consider the following factors:

- (a) the age and maturity of the child witness;
- (b) the possible effect that testifying in person might have on the child witness;
- (c) the extent of the trauma that the child witness has already suffered;
- (d) the nature of the testimony to be given by the child witness;
- (e) the nature of the offense, including but not limited to the use of a firearm or other deadly weapon during the commission of the crime or the infliction of serious bodily injury upon the victim during the commission of the crime;

(f) threats made to the child witness or the child witness's family in order to prevent or dissuade the child witness from attending or giving testimony at any trial or court proceeding or to prevent the child witness from reporting the alleged offense or from assisting in criminal prosecution. Threats referred to under this subsection (3)(f) may include but are not limited to threats of serious bodily injury to be inflicted on the child witness or a family member, threats of incarceration or deportation of the child witness or a family member, or threats of removal of the child witness from the family or dissolution of the family.

(g) conduct on the part of the defendant or the defendant's attorney that causes the child witness to be unable to continue the child witness's testimony; and

(h) any other matter that the court considers relevant.

(4) The court may consider hearsay evidence OF STATEMENTS BY THE CHILD WITNESS, including but not limited to reports or testimony by psychologists or counselors who have examined or treated the child witness, law enforcement reports, and reports by the child witness's guardian ad litem.

(5) The child witness may not be compelled to testify at a hearing held pursuant to this section. The court may examine the child witness in chambers outside the presence of the defendant. An in-chambers examination

of a child witness must be conducted solely by the court, must be conducted on the record, and must be conducted in the presence of the prosecution, the defendant's counsel, and the child witness's adult attendant.

(6) IN THE CASE OF A CHILD WITNESS, AS DEFINED IN [SECTION 1(2)(B)], WHO IS MORE THAN 13 YEARS OF AGE, THE COURT SHALL FIND, AS A CONDITION PRECEDENT TO MAKING AN ORDER PURSUANT TO [SECTION 4], THAT THE CHILD WITNESS POSSESSES A MENTAL STATE OF A CHILD 13 YEARS OF AGE OR YOUNGER.

NEW SECTION. Section 4. Order for two-way electronic audio-video communication testimony -- finding by court -- procedure for conducting testimony. (1) The court shall order that the testimony of a child witness be taken by two-way electronic audio-video communication if, after considering the factors set forth in [section 3(3)], the court finds by clear and convincing evidence that the child witness is unable to testify in open court in the presence of the defendant for any of the following reasons:

- (a) the child witness is unable to testify because of fear caused by the presence of the defendant;
- (b) the child witness would suffer substantial emotional trauma from testifying in the presence of the defendant; or
- (c) conduct by the defendant or the defendant's attorney causes the child witness to be unable to continue testifying.

(2) If the court orders that the child witness's testimony be taken by two-way electronic audio-video communication, the testimony must be taken outside the courtroom in a suitable location designated by the judge. Examination and cross-examination of the child witness must proceed as though the child witness were testifying in the courtroom. The only persons who may be permitted in the room with the child witness during the child's testimony are:

- (a) the judge or a judicial officer appointed by the court;
- (b) the prosecutor;
- (c) the defense attorney;
- (d) the child's attorney;
- (e) an adult attendant;
- (f) persons necessary to operate the two-way electronic audio-video communication equipment; and
- (g) any person whose presence is determined by the court to be necessary to the welfare and well-being of the child witness.

(3) The defendant must be afforded a means of private, contemporaneous communication with the defendant's attorney during the testimony.

(4) A child witness who testifies at or attends a criminal proceeding has the right to be accompanied by an adult attendant. THE COURT MAY CONSIDER AN INDIVIDUAL'S INTEREST IN THE OUTCOME OF THE CRIMINAL PROCEEDING IN WHICH THE CHILD WILL TESTIFY IN DECIDING WHETHER THAT INDIVIDUAL MAY SERVE AS AN ADULT ATTENDANT. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child witness while the child witness testifies. The court may allow the adult attendant to hold the child witness's hand or allow the child witness to sit on the adult attendant's lap throughout the course of the proceeding. An adult attendant may not provide the child witness an answer to any question directed to the child witness during the course of the child witness's testimony or otherwise prompt the child witness. The image of the adult attendant must be recorded on videotape during the time that the child witness is testifying.

(5) The court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device the court considers appropriate for the purpose of assisting a child witness in testifying.

(6) This section does not preclude the presence of both a victim and the defendant in the courtroom together for purposes of establishing or challenging the identification of the defendant when identification is a legitimate issue in the proceeding.

(7) The provisions of [sections 1 through 3] and this section do not apply if:

(a) the defendant has not retained legal counsel but has a public defender, as defined in 47-1-103, assisting the defendant in the defense, in which case only the public defender may be permitted in the room with the child witness during the child witness's testimony; or

(b) the jurisdiction in which the criminal proceeding is to be conducted does not have access to two-way electronic audio-video communication equipment.

(8) Testimony by two-way electronic audio-video communication that is a part of the court record is subject to a protective order of the court for the purpose of protecting the privacy of the alleged victim.

NEW SECTION. Section 5. Repealer. Section 46-16-216, MCA, is repealed.

NEW SECTION. Section 6. Codification instruction. [Sections 1 through 4] are intended to be codified as an integral part of Title 46, chapter 16, part 2, and the provisions of Title 46, chapter 16, part 2, apply to [sections 1 through 4].

NEW SECTION. Section 7. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part

remains in effect in all valid applications that are severable from the invalid applications.

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