

Senate Bill No. 606

(By Senators Palumbo, Unger, Jenkins, Klempa and Foster)

[Introduced February 15, 2012; referred to
the Committee on the Judiciary.]

A BILL to amend and reenact §60A-7-706 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto six new sections, designated §61-8C-6, §61-8C-7, §61-8C-8, §61-8C-9, §61-8C-10 and §61-8C-11, all relating to forfeiture of certain property; correcting a technical error; stating legislative findings; providing for the forfeiture of certain materials related to recording sexually explicit conduct of minors or soliciting minors; establishing a procedure for seizure of forfeitable property; creating procedures for forfeiture; setting process for disposition and distribution of forfeited moneys, securities and negotiable instruments; and creating process for disposition and distribution of other forfeited properties.

Be it enacted by the Legislature of West Virginia:

That §60A-7-706 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto six new sections, designated §61-8C-6, §61-8C-7, §61-8C-8, §61-8C-9, §61-8C-10 and §61-8C-11, all to read as follows:

**CHAPTER 60A. UNIFORM CONTROLLED
SUBSTANCES ACT.**

ARTICLE 7. WEST VIRGINIA CONTRABAND FORFEITURE ACT.

§60A-7-706. Disposition of forfeited moneys, securities or other negotiable instruments; distribution of proceeds.

1 (a) Whenever moneys, securities or other negotiable
2 instruments are forfeited under the provisions of this article,
3 such proceeds shall be distributed as follows:

4 (1) Ten percent of the proceeds shall be tendered to the
5 office of the prosecuting attorney which initiated the
6 forfeiture proceeding;

7 (2) The balance shall be deposited in a special law-
8 enforcement investigation fund. The fund may be placed in
9 any interest-bearing depository insured by an agency of the
10 federal government. The fund shall be administered by the
11 chief of the law-enforcement agency that seized the forfeited
12 property.

13 (b) No funds shall be expended from the special law-
14 enforcement investigation fund except as follows:

15 (1) In the case of the funds belonging to the ~~department~~
16 ~~of public safety~~ State Police, the funds shall only be ex-
17 pended at the direction of the Superintendent of the ~~depart-~~
18 ~~ment~~ State Police and in accordance with the provisions of
19 section fifteen, article two, chapter five-a of this code and
20 the provisions of subdivision (10), subsection ~~(j)~~ (b), section
21 two, article two, chapter twelve of this code;

22 (2) In the case of funds belonging to the office of either
23 the sheriff or prosecuting attorney of any county in which
24 the special fund has been created, the funds therein may only
25 be expended in the manner provided in sections four and
26 five, article five, chapter seven of this code; and

27 (3) In the case of funds belonging to the police depart-
28 ment of any municipality in which the special fund has been
29 created, the funds therein may only be expended in the
30 manner provided in section twenty-two, article thirteen,
31 chapter eight of this code.

CHAPTER 61. CRIMES AND THEIR PUNISHMENT.

ARTICLE 8C. FILMING OF SEXUALLY EXPLICIT CONDUCT OF MINORS.

§61-8C-6. Legislative findings.

1 The Legislature hereby finds and declares that the
2 seizure and sale of items under the provisions of this article
3 is not contemplated to be a forfeiture as the same is used in
4 article twelve, section five of the West Virginia Constitution
5 and to the extent that such seizure and sale may be found to
6 be such a forfeiture, the Legislature hereby finds and
7 declares that the proceeds from a seizure and sale under this
8 article is not part of net proceeds as the same is contem-
9 plated by such article twelve, section five of the West
10 Virginia Constitution.

**§61-8C-7. Items subject to forfeiture; persons authorized to seize
property subject to forfeiture.**

1 (a) The following are subject to forfeiture:

2 (1) All visual depictions which have been manufactured,
3 distributed, dispensed or possessed in violation of article
4 eight-a or eight-c of this chapter or section fourteen-b,
5 article three-c of this chapter;

6 (2) All raw materials, products and equipment of any
7 kind which are used, or intended for use, in manufacturing,
8 processing, delivering, importing or exporting any visual
9 depictions or any crimes against children in violation of

10 article eight-a or eight-c of this chapter or section fourteen-
11 b, article three-c of this chapter;

12 (3) All books, records, research products and materials,
13 including hard drives, microfilm, tapes and data which are
14 used, or have been used, or are intended for use, in violation
15 of article eight-a or eight-c of this chapter or section
16 fourteen-b, article three-c of this chapter;

17 (4) All moneys, negotiable instruments, securities or
18 other things of value furnished or intended to be furnished
19 in violation of articles eight-a or eight-c of this chapter or
20 section fourteen-b, article three-c of this chapter by any
21 person in exchange for a visual depiction, all proceeds
22 traceable to the exchange and all moneys, negotiable
23 instruments and securities used, or which are intended to be
24 used, to facilitate any violation of article eight-a or eight-c
25 of this chapter or section fourteen-b, article three-c of this
26 chapter: *Provided*, That no property may be forfeited under
27 this subdivision, to the extent of the interest of an owner, by
28 reason of any act or omission established by that owner to
29 have been committed or omitted without his or her knowl-
30 edge or consent; and

31 (5) All conveyances, including aircraft, vehicles or
32 vessels, which are used, have been used, or are intended for
33 use, to transport, or in any manner to facilitate the transpor-
34 tation, sale, receipt, possession or concealment of property
35 described in subdivision (1), (2) or (3) of this subsection,
36 except that:

37 (A) A conveyance used by any person as a common
38 carrier in the transaction of business as a common carrier
39 shall not be forfeited under this section unless it appears that
40 the person owning the conveyance is a consenting party or
41 privy to a violation of article eight-a or eight-c of this
42 chapter or section fourteen-b, article three-c of this chapter;

43 (B) A conveyance shall not be forfeited under the
44 provisions of this article if the person owning the conveyance
45 establishes that he or she neither knew, nor had reason to
46 know, that the conveyance was being employed or was likely
47 to be employed in a violation of article eight-a or eight-c of
48 this chapter or section fourteen-b, article three-c of this
49 chapter; and

50 (C) A bona fide security interest or other valid lien in any
51 conveyance shall not be forfeited under the provisions of this
52 article, unless the state proves by a preponderance of the

53 evidence that the holder of the security interest or lien either
54 knew, or had reason to know, that the conveyance was being
55 used or was likely to be used in a violation of article eight-a
56 or eight-c of this chapter or section fourteen-b, article three-
57 c of this chapter.

58 (b) Property subject to forfeiture under this article may
59 be seized by the State Police (hereinafter referred to as the
60 “appropriate person” in this article).

61 (c) Visual depictions which are manufactured, possessed,
62 transferred, sold or offered for sale in violation of this article
63 are contraband and shall be seized and summarily forfeited
64 to the state. Visual depictions which are seized or come into
65 the possession of the state, the owners of which are un-
66 known, are contraband and shall be summarily forfeited to
67 the state upon the seizure of the visual depictions.

68 (d) Notwithstanding any other provisions of this article
69 to the contrary, any items of tangible personal property sold
70 to a bona fide purchaser are not subject to forfeiture unless
71 the state establishes by clear and convincing proof that the
72 bona fide purchaser knew or should have known that the
73 property had in the previous three years next preceding the
74 sale been used in violation of this chapter.

75 (e) Notwithstanding any other provisions of this code to
76 the contrary, any person who has an ownership interest in
77 items of tangible personal property subject to forfeiture by
78 this article shall be presumed to be an innocent owner.
79 Unless the state establishes by clear and convincing proof
80 that the innocent owner knew or should have known that the
81 property subject to forfeiture had been used in violation of
82 article eight-a or eight-c of this chapter or section fourteen-
83 b, article three-c of this chapter and, if applicable, that the
84 innocent owner did not do all that reasonably could be
85 expected under the circumstances to terminate the illegal use
86 of the property once he or she had knowledge of it, the court
87 shall enter an order either: (1) Severing the property appro-
88 priately; (2) transferring the property to the state with a
89 provision that the state shall compensate the petitioner to
90 the extent of his or her ownership interest once a final order
91 of forfeiture has been entered and the property has been
92 reduced to liquid assets; or (3) permitting the petitioner to
93 retain the property subject to a lien in favor of the state to
94 the extent of the forfeitable interest in the property. If the
95 state meets the burden set forth in this section, then the
96 court shall enter an order declaring the coowner is not an

97 innocent owner and allowing forfeiture proceedings to
98 continue, pursuant to the requirements set forth in this
99 article.

§61-8C-8. Procedures for seizure of forfeitable property.

1 (a) Seizure of property made subject to forfeiture by the
2 provisions of this article may be made upon process issued by
3 any court of record having jurisdiction over the property.

4 (b) Notwithstanding the provisions of subsection (a) of
5 this section, seizure of property subject to forfeiture by the
6 provisions of this article may be made without process if:

7 (1) The seizure is incident to a lawful arrest or pursuant
8 to a search under a search warrant or an inspection warrant;

9 (2) The property subject to seizure has been the subject
10 of a prior judgment in favor of the state in a forfeiture
11 proceeding based upon this article;

12 (3) The appropriate person has probable cause to believe
13 that the property is directly or indirectly dangerous to health
14 or safety; or

15 (4) The appropriate person has probable cause to believe
16 that the property was used or intended for use in violation of
17 this chapter.

18 (c) In the event of seizure pursuant to subsection (b) of
19 this section, forfeiture proceedings shall be instituted within
20 ninety days of the seizure thereof.

21 (d) Property taken or detained under this section shall
22 not be subject to replevin, but is deemed to be in the custody
23 of the appropriate person, subject only to the orders and
24 decrees of the court having jurisdiction over the forfeiture
25 proceedings. When property is seized under this article, the
26 appropriate person may:

27 (1) Place the property under seal;

28 (2) Remove the property to a place designated by him or
29 her;

30 (3) Require the appropriate law-enforcement agency to
31 take custody of the property and remove it to an appropriate
32 location for disposition in accordance with law; or

33 (4) In the case of seized moneys, securities or other
34 negotiable instruments, place the assets in any interest-
35 bearing depository insured by an agency of the federal
36 government.

§61-8C-9. Procedures for forfeiture.

1 (a)(1) Any proceeding wherein the state seeks forfeiture
2 of property subject to forfeiture under this article shall be a

3 civil proceeding. A petition for forfeiture may be filed on
4 behalf of the state and any law-enforcement agency making
5 a seizure under this article by the prosecuting attorney of a
6 county, or duly appointed special prosecutor.

7 (2) A petition for forfeiture may be filed and proceedings
8 held thereon in the circuit court of the county wherein the
9 seizure was made, the real property subject to forfeiture is
10 situate or the circuit court of the county wherein any owner
11 of the property subject to forfeiture may reside.

12 (3) Any civil trial stemming from a petition for forfeiture
13 brought under this article at the demand of either party shall
14 be by jury.

15 (4) A petition for forfeiture of the seized property shall be
16 filed within ninety days after the seizure of the property in
17 question. The petition shall be verified by oath or affirmation
18 of a law-enforcement officer representing the law-enforce-
19 ment agency responsible for the seizure or the prosecuting
20 attorney and shall contain the following:

21 (A) A description of the property seized;

22 (B) A statement as to who is responsible for the seizure;

23 (C) A statement of the time and place of seizure;

24 (D) The identity of the owner or owners of the property,
25 if known;

26 (E) The identity of the person or persons in possession of
27 the property at the time seized, if known;

28 (F) A statement of facts upon which probable cause for
29 belief that the seized property is subject to forfeiture pursu-
30 ant to the provisions of this article is based;

31 (G) The identity of all persons or corporations having a
32 perfected security interest or lien in the subject property, as
33 well as the identity of all persons or corporations known to
34 the affiant who may be holding a possessory or statutory lien
35 against such property; and

36 (H) A prayer for an order directing forfeiture of the
37 seized property to the state, and vesting ownership of such
38 property in the state.

39 (b) At the time of filing or as soon as practicable thereaf-
40 ter, a copy of the petition for forfeiture shall be served upon
41 the owner or owners of the seized property, as well as all
42 holders of a perfected security interest or lien or of a
43 possessory or statutory lien in the same class, if known.
44 Should diligent efforts fail to disclose the lawful owner or
45 owners of the seized property, a copy of the petition for

46 forfeiture shall be served upon any person who was in
47 possession or alleged to be in possession of the property at
48 the time of seizure, where such person's identity is known.
49 The above service shall be made pursuant to the provisions
50 of the West Virginia Rules of Civil Procedure. Any copy of
51 the petition for forfeiture so served shall include a notice
52 substantially as follows: "To any claimant to the within
53 described property: You have the right to file an answer to
54 this petition setting forth your title in, and right to posses-
55 sion of, the property within thirty days from the service
56 hereof. If you fail to file an answer, a final order forfeiting
57 the property to the state will be entered, and such order is
58 not subject to appeal."

59 If no owner or possessors, lien holders or holders of a
60 security interest be found, then such service may be by Class
61 II legal publication in accordance with the provisions of
62 article three, chapter fifty-nine of this code, and the publica-
63 tion area shall be the county wherein such property was
64 located at the time of seizure and the county wherein the
65 petition for forfeiture is filed.

66 (c) In addition to the requirements of subsection (b)
67 above, the prosecuting attorney or law-enforcement officer

68 upon whose oath or affirmation the petition for forfeiture is
69 based, shall be responsible for the publication of a further
70 notice. Such further notice that a petition for forfeiture has
71 been filed shall be published by Class II legal advertisement
72 in accordance with article three, chapter fifty-nine of this
73 code. The publication area shall be the county wherein the
74 property was seized and the county wherein the petition for
75 forfeiture is filed. The notice shall advise any claimant to the
76 property of their right to file a claim on or before the date set
77 forth in the notice, which date shall not be less than thirty
78 days from the date of the first publication. The notice shall
79 specify that any claim must clearly state the identity of the
80 claimant and an address where legal process can be served
81 upon that person. In addition such notice shall contain the
82 following information:

- 83 (1) A description of the property seized;
- 84 (2) A statement as to who is responsible for the seizure;
- 85 (3) A statement of the time and place of seizure;
- 86 (4) The identity of the owner or owners of the property,
87 if known;
- 88 (5) The identity of the person or persons in possession of
89 the property at the time of seizure, if known; and

90 (6) A statement that prayer for an order directing
91 forfeiture of the seized property to the state, and vesting
92 ownership of such property in the state shall be requested of
93 the court.

94 (d) If no answer or claim is filed within thirty days of the
95 date of service of the petition pursuant to subsection (b) of
96 this section, or within thirty days of the first publication
97 pursuant to subsection (b) of this section, the court shall
98 enter an order forfeiting the seized property to the state. If
99 any claim to the seized property is timely filed, a time and
100 place shall be set for a hearing upon such claim. The claim-
101 ant or claimants shall be given notice of such hearing not
102 less than ten days prior to the date set for the hearing.

103 (e) At the hearing upon the claim or claims, the state
104 shall have the burden of proving by a preponderance of the
105 evidence that the seized property is subject to forfeiture
106 pursuant to the provisions of this chapter.

107 (f) Any order forfeiting property to the state and entered
108 pursuant to this section perfects the state's right, title and
109 interest in the forfeited property and relates back to the date
110 of seizure: *Provided*, That in any proceeding under this
111 article the circuit court shall in its final order make specific

112 findings with respect to whether or not probable cause to
113 seize such property existed at the time of such seizure.

114 (g) During the pendency of a forfeiture proceeding, it is
115 unlawful for any property owner or holder of a bona fide
116 security interest or other valid lien holder to transfer or
117 attempt to transfer any ownership interest or security
118 interest in seized property with the intent to defeat the
119 purpose of this article, and the court wherein the petition for
120 forfeiture is filed may enjoin a property owner or holder of
121 a security interest or other lien holder from making such a
122 transfer should one come to its attention. Any such transfer
123 which is made in violation of the provisions of this subsec-
124 tion shall have no effect upon an order of the court forfeiting
125 seized property to the state if a notice of lis pendens is filed
126 prior to the recording of the instrument of transfer.

127 (h) The court may void any transfer of property made
128 before or after a forfeiture proceeding has been commenced,
129 which is subject to forfeiture, if the transfer was not to a
130 bona fide purchaser without notice for value.

131 (i) An appeal of a decision of the circuit court concerning
132 a forfeiture proceeding brought pursuant to this chapter
133 must be filed within one hundred twenty days of the date of

134 entry of the final appealable order. The appellant shall be
135 required to give notice of intent to appeal within thirty days
136 of the entry of such appealable order.

**§61-8C-10. Disposition of forfeited moneys, securities or other
negotiable instruments; distribution of proceeds.**

1 (a) Whenever moneys, securities or other negotiable
2 instruments are forfeited under the provisions of this article,
3 such proceeds shall be distributed as follows:

4 (1) Ten percent of the proceeds shall be tendered to the
5 office of the prosecuting attorney which initiated the
6 forfeiture proceeding;

7 (2) The balance shall be deposited in a special law-
8 enforcement investigation fund. The fund may be placed in
9 any interest-bearing depository insured by an agency of the
10 federal government. The fund shall be administered by the
11 Superintendent of the State Police or his or her designee.

12 (b) No funds shall be expended from the special law-
13 enforcement investigation fund except as follows:

14 (1) In the case of funds belonging to the State Police, the
15 funds shall only be expended at the direction of the Superin-
16 tendent of the State Police and in accordance with the
17 provisions of section fifteen, article two, chapter five-a of

18 this code and the provisions of subdivision (10), subsection
19 (b), section two, article two, chapter twelve of this code;

20 (2) In the case of funds belonging to the office of the
21 prosecuting attorney of any county in which the special fund
22 has been created, the funds therein may only be expended in
23 the manner provided in sections four and five, article five,
24 chapter seven of this code; and

25 (3) In the case of funds belonging to the police depart-
26 ment of any municipality in which the special fund has been
27 created, the funds therein may only be expended in the
28 manner provided in section twenty-two, article thirteen,
29 chapter eight of this code.

**§61-8C-11. Disposition of other forfeited property; distribution of
proceeds.**

1 (a) When property other than that referred to in section
2 ten of this article is forfeited under this article, the circuit
3 court ordering the forfeiture, upon application by the
4 prosecuting attorney or the Superintendent of the State
5 Police or his or her designee, may direct that:

6 (1) Title to the forfeited property be vested in the law-
7 enforcement agency so petitioning;

8 (2) The law-enforcement agency responsible for the
9 seizure retain the property for official use; or

10 (3) The forfeited property shall be offered at public
11 auction to the highest bidder for cash. Notice of such public
12 auction shall be published as a Class III legal advertisement
13 in accordance with article three, chapter fifty-nine of this
14 code. The publication area shall be the county where the
15 public auction will be held.

16 (b) When a law-enforcement agency receives property
17 pursuant to this section, the court may, upon request of the
18 prosecuting attorney initiating the forfeiture proceeding,
19 require the law-enforcement agency to pay unto the office of
20 said prosecuting attorney a sum not to exceed ten percent of
21 the value of the property received to compensate said office
22 for actual costs and expenses incurred.

23 (c) The proceeds of every public sale conducted pursuant
24 to this section shall be paid and applied as follows: First, to
25 the balance due on any security interest preserved by the
26 court; second, to the costs incurred in the storage, mainte-
27 nance and security of the property; and third, to the costs
28 incurred in selling the property.

29 (d) Any proceeds of a public sale remaining after distri-
30 bution pursuant to subsection (c) of this section shall be
31 distributed as follows:

32 (1) Ten percent of such proceeds shall be tendered to the
33 office of the prosecuting attorney who initiated the forfeiture
34 proceeding.

35 (2) The balance shall be deposited in a special law-
36 enforcement investigation fund. Such fund shall be adminis-
37 tered by the Superintendent of the State Police or his or her
38 designee and shall take the form of an interest-bearing
39 account with any interest earned to be compounded to the
40 fund. Any funds deposited in the special law-enforcement
41 investigative fund pursuant to this article shall be expended
42 only to defray the costs of protracted or complex investiga-
43 tions, to provide additional technical equipment or expertise,
44 to provide matching funds to obtain federal grants or for
45 such other law-enforcement purposes as the Superintendent
46 of the State Police or his or her designee may deem appropri-
47 ate; however, these funds may not be utilized for regular
48 operating needs.

49 (e) If more than one law-enforcement agency was
50 substantially involved in effecting the seizure and forfeiture

51 of property, the court wherein the petition for forfeiture was
52 filed shall equitably distribute the forfeited property among
53 the law-enforcement agencies. In the event of a public sale
54 of such property pursuant to subsection (a) of this section,
55 the court shall equitably distribute any proceeds remaining
56 after distribution pursuant to subsection (c) and subdivision
57 (1), subsection (d) of this section among such law-enforce-
58 ment agencies for deposit into their individual special law-
59 enforcement investigative fund. Equitable distribution shall
60 be based upon the overall contribution of the individual law-
61 enforcement agency to the investigation which led to the
62 seizure.

63 (f) Upon the sale of any forfeited property for which title
64 or registration is required by law, the state shall issue a title
65 or registration certificate to any bona fide purchaser at a
66 public sale of the property conducted pursuant to subsection
67 (a) of this section. Upon the request of the law-enforcement
68 agency receiving, pursuant to the order of the court, or
69 electing to retain, pursuant to subsection (a) of this section,
70 any forfeited property for which title or registration is
71 required by law, the state shall issue a title or registration
72 certificate to the appropriate governmental body.

73 (g) Any funds expended pursuant to the provisions of this
74 section, shall only be expended in the manner provided in
75 subsection (b), section nine of this article.

76 (h) Every prosecuting attorney or law-enforcement
77 agency receiving forfeited property or proceeds from the sale
78 of forfeited property pursuant to this article shall submit an
79 annual report to the body which has budgetary authority
80 over such agency. Such report shall specify the type and
81 approximate value of all forfeited property and the amount
82 of proceeds from the sale of forfeited property received in the
83 preceding year. No county or municipality may use antici-
84 pated receipts of forfeited property in their budgetary
85 process.

86 (i) In lieu of the sale of any forfeited property subject to
87 a bona fide security interest preserved by an order of the
88 court, the law-enforcement agency receiving the forfeited
89 property may pay the balance due on any security interest
90 preserved by the court from funds budgeted to the office or
91 department or from the special fund and retain possession of
92 the forfeited property for official use pursuant to subsection
93 (a) of this section.

94 (j) In every case where property is forfeited, disposition
95 of the forfeited property, in accordance with this article,
96 shall be made within six months of the date upon which the
97 court of jurisdiction orders forfeiture. Should the office or
98 agency receiving the property fail either to place the prop-
99 erty in official use or dispose of the property in accordance
100 with law, the court of jurisdiction shall cause disposition of
101 the property to be made with any proceeds therefrom to be
102 awarded to the state.

103 (k) No disposition shall occur until all applicable periods
104 for filing a notice of intent to appeal has expired and no
105 party in interest shall have filed such notice. The filing of the
106 notice of intent to appeal shall stay any such disposition
107 until the appeal has been finally adjudicated or until the
108 appeal period of one hundred eighty days has expired
109 without an appeal having actually been taken or filed, unless
110 a valid extension of the appeal has been granted by the
111 circuit court under the provisions of section seven, article
112 four, chapter fifty-eight of this code.

113 (l) The special law-enforcement investigative funds of
114 each law-enforcement agency may be placed in an interest-
115 bearing depository insured by the federal government.

(NOTE: The purpose of this bill is to create a procedure for forfeiture of items related to child pornography arrests and other computer crimes and prosecutions.

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

§61-8C-6, §61-8C-7, §61-8C-8, §61-8C-9, §61-8C-10 and §61-8C-11 are new; therefore, strike-throughs and underscoring have been omitted.)

JUDICIARY COMMITTEE AMENDMENTS

On page eight, section seven, line eighty-nine, by striking out the word “petitioner” and inserting in lieu thereof the words “innocent owner”;

On page eight, section seven, line ninety-two, by striking out the word “petitioner” and inserting in lieu thereof the words “innocent owner”;

And,

On page eight, section seven, line ninety-six, by striking out the word “coowner” and inserting in lieu thereof the words “person with an ownership interest”.