

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Introduced

House Bill 2367

**FISCAL
NOTE**

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[Introduced February 13, 2017; Referred
to the Committee on the Judiciary.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
 2 designated §61-3F-1, §61-3F-2 and §61-3F-3, all relating to establishing a criminal offense
 3 of organized retail crime; defining terms; providing crime elements and penalties, and
 4 providing procedures for forfeiture of assets derived from defined criminal activity.

Be it enacted by the Legislature of West Virginia:

1 That the Code of West Virginia, 1931, as amended, be amended by adding thereto
 2 a new article, designated §61-3F-1, §61-3F-2 and §61-3F-3, all to read as follows:

ARTICLE 3F. ORGANIZED RETAIL CRIME.

§61-3F-1. Definitions.

1 For the purpose of this article:

2 (1) "Organized retail crime" means the theft by one person, or by two or more persons
 3 working in association, from one or more than one retail establishment within a period of ninety
 4 days or less between the first and second episode, the second and third thefts, or between any
 5 succeeding thefts, with the intent to sell that retail property for monetary or other gain, and the
 6 aggregated value of the retail price of all the property exceeds \$1,500.

7 (3) "Retail property" means any article, product, commodity, item, or component offered
 8 for sale in a retail establishment.

9 (4) "Retail establishment" means any entity or person within this state who sells, transfers
 10 or distributes goods to an ultimate consumer.

11 (5) "Theft" means to take possession of, carry away, transfer, conceal or cause to be
 12 carried away the retail property of another with the intent to steal the retail property.

13 (6) "Retail price" means the retail value of an item offered for sale by a retail establishment.

§61-3F-2. Organized retail theft.

1 (a)(1) Any person who knowingly commits an organized retail crime; or organizes,
 2 supervises, finances, conspires, receives retail goods from or otherwise manages or assists

3 another person in committing an organized retail crime of theft of \$2,000 or less, is guilty of a
4 misdemeanor and, upon conviction thereof, shall be fined not less than \$1,500 nor more than
5 \$3,000 or confined in jail not more than one year, or both fined and confined.

6 (2) Any person who knowingly commits an organized retail crime; or organizes,
7 supervises, finances, conspires, receives retail goods from or otherwise manages or assists
8 another person in committing an organized retail crime of theft of more than \$2,000, is guilty of a
9 felony and, upon conviction thereof, shall be fined not more than \$2,500, be imprisoned in a state
10 correctional facility not less than one nor more than five years, or both fined and imprisoned.

11 (b) Organized retail thefts committed pursuant to this section in different counties may be
12 prosecuted in any county in which one of the thefts occurred.

13 (c) Any interest a person has acquired or maintained in any cash, asset or other property
14 of value in any form, derived in part or total from any proceeds from participating in organized
15 retail crime is subject to forfeiture pursuant to the provisions of section three of this article.

16 (d) It is not a defense to a charge under this section that the property was not stolen at the
17 time of the violation if the property was explicitly represented to the accused person as being
18 stolen property.

§61-3F-3. Procedures for forfeiture.

1 (a) (1) Any proceeding wherein the state seeks forfeiture of property subject to forfeiture
2 under this article shall be a civil proceeding. A petition for forfeiture may be filed on behalf of the
3 state and any law-enforcement agency making a seizure under this article by the prosecuting
4 attorney of a county, or duly appointed special prosecutor.

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

8 (3) Any civil trial stemming from a petition for forfeiture brought under this chapter at the
9 demand of either party shall be by jury.

10 (4) A petition for forfeiture of the seized property shall be filed within ninety days after the
11 seizure of the property in question. The petition shall be verified by oath or affirmation of a law-
12 enforcement officer representing the law-enforcement agency responsible for the seizure or the
13 prosecuting attorney and shall contain the following:

14 (i) A description of the property seized;

15 (ii) A statement as to who is responsible for the seizure;

16 (iii) A statement of the time and place of seizure;

17 (iv) The identity of the owner or owners of the property, if known;

18 (v) The identity of the person or persons in possession of the property at the time seized,
19 if known;

20 (vi) A statement of facts upon which probable cause for belief that the seized property is
21 subject to forfeiture pursuant to the provisions of this article is based;

22 (vii) The identity of all persons or corporations having a perfected security interest or lien
23 in the subject property, as well as the identity of all persons or corporations known to the affiant
24 who may be holding a possessory or statutory lien against such property;

25 (viii) A prayer for an order directing forfeiture of the seized property to the state, and
26 vesting ownership of such property in the state.

27 (b) At the time of filing or as soon as practicable thereafter, a copy of the petition for
28 forfeiture shall be served upon the owner or owners of the seized property, as well as all holders
29 of a perfected security interest or lien or of a possessory or statutory lien in the same class, if
30 known. Should diligent efforts fail to disclose the lawful owner or owners of the seized property, a
31 copy of the petition for forfeiture shall be served upon any person who was in possession or
32 alleged to be in possession of the property at the time of seizure, where such person's identity is
33 known. The above service shall be made pursuant to the provisions of the West Virginia Rules of
34 Civil Procedure. Any copy of the petition for forfeiture so served shall include a notice substantially
35 as follows:

36 "To any claimant to the within described property: You have the right to file an answer to
37 this petition setting forth your title in, and right to possession of, the property within thirty days
38 from the service hereof. If you fail to file an answer, a final order forfeiting the property to the state
39 will be entered, and the order is not subject to appeal."

40 If no owner or possessors, lienholders or holders of a security interest is found, then
41 service may be by Class II legal publication in accordance with the provisions of article three,
42 chapter fifty-nine of this code, and the publication area shall be the county wherein the property
43 was located at the time of seizure and the county wherein the petition for forfeiture is filed.

44 (c) In addition to the requirements of subsection (b) above, the prosecuting attorney or
45 law-enforcement officer upon whose oath or affirmation the petition for forfeiture is based, shall
46 be responsible for the publication of a further notice. The further notice that a petition for forfeiture
47 has been filed shall be published by Class II legal advertisement in accordance with article three,
48 chapter fifty-nine of this code. The publication area shall be the county wherein the property was
49 seized and the county wherein the petition for forfeiture is filed. The notice shall advise any
50 claimant to the property of his or her right to file a claim on or before the date set forth in the
51 notice, which date shall not be less than thirty days from the date of the first publication. The
52 notice shall specify that any claim must clearly state the identity of the claimant and an address
53 where legal process can be served upon that person. In addition, the notice shall contain the
54 following information:

55 (1) A description of the property seized;

56 (2) A statement of who is responsible for the seizure;

57 (3) A statement of the time and place of seizure;

58 (4) The identity of the owner or owners of the property, if known;

59 (5) The identity of the person or persons in possession of the property at the time of
60 seizure, if known;

61 (6) A statement that prayer for an order directing forfeiture of the seized property to the

62 state, and vesting ownership of the property in the state shall be requested of the court.

63 (d) If no answer or claim is filed within thirty days of the date of service of the petition
64 pursuant to subsection (b) of this section, or within thirty days of the first publication pursuant to
65 subsection (b) of this section, the court shall enter an order forfeiting the seized property to the
66 state. If any claim to the seized property is timely filed, a time and place shall be set for a hearing
67 upon the claim. The claimant or claimants shall be given notice of the hearing not less than ten
68 days prior to the date set for the hearing.

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

72 (f) Any order forfeiting property to the state and entered pursuant to this section perfects
73 the state's right, title and interest in the forfeited property and relates back to the date of seizure:
74 Provided, That in any proceeding under this article the circuit court shall in its final order make
75 specific findings with respect to whether or not probable cause to seize the property existed at
76 the time of the seizure.

77 (g) During the pendency of a forfeiture proceeding, it is unlawful for any property owner or
78 holder of a bona fide security interest or other valid lienholder to transfer or attempt to transfer
79 any ownership interest or security interest in seized property with the intent to defeat the purpose
80 of this article, and the court wherein the petition for forfeiture is filed may enjoin a property owner
81 or holder of a security interest or other lienholder from making such a transfer should one come
82 to its attention. Any such transfer which is made in violation of the provisions of this subsection
83 shall have no effect upon an order of the court forfeiting seized property to the state if a notice of
84 *lis pendens* is filed prior to the recording of the instrument of transfer.

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

88 (i) An appeal of a decision of the circuit court concerning a forfeiture proceeding brought
89 pursuant to this chapter must be filed within one hundred twenty days of the date of entry of the
90 final appealable order. The appellant shall be required to give notice of intent to appeal within
91 thirty days of the entry of the appealable order.

NOTE: The purpose of this bill is to establish a new crime of organized retail crime, establishing penalties; and providing for forfeiture of property or other asset derived from organized retail crime.

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