

WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

Introduced

House Bill 4288

FISCAL
NOTE

By Delegate Horst and C. Pritt

[Introduced January 10, 2024; Referred
to the Committee on Judiciary]

1 A BILL to repeal §60A-7-701, §60A-7-702, §60A-7-703, §60A-7-704, §60A-7-705, §60A-7-705a,
2 §60A-7-706, §60A-7-707, and §60A-7-708 of the Code of West Virginia, 1931, as
3 amended; and to amend said code by adding thereto a new article, designated §60A-12-1,
4 §60A-12-2, §60A-12-3, §60A-12-4, §60A-12-5, §60A-12-6, §60A-12-7, §60A-12-8, §60A-
5 12-9, §60A-12-10, §60A-12-11, §60A-12-12, §60A-12-13, §60A-12-14, §60A-12-15, §60A-
6 12-16, §60A-12-17, §60A-12-18, §60A-12-19, §60A-12-20, §60A-12-21, §60A-12-22,
7 §60A-12-23, §60A-12-24, §60A-12-25, §60A-12-26, §60A-12-27, §60A-12-28, §60A-12-
8 29, §60A-12-30, §60A-12-31, §60A-12-32, §60A-12-33, §60A-12-34, and §60A-12-35, all
9 relating to the creation of the Criminal Forfeiture Process Act replacing the West Virginia
10 Contraband Forfeiture Act; providing that this article applies to the seizure and forfeiture of
11 property used in and derived directly from the crime involving controlled substances;
12 definitions, procedure; providing that there is no civil forfeiture and that the court with
13 jurisdiction of criminal matter has jurisdiction of the forfeiture procedure; seizure of
14 property, both real and personal; providing that there is no property right to contraband;
15 hearing and appeal; return and disposition of property; restrictions on sales; preemption of
16 local laws; and prohibiting an offer for adoption property, seized under state law, to a
17 federal agency for the purpose of forfeiture under federal law.

Be it enacted by the Legislature of West Virginia:

ARTICLE 7. WEST VIRGINIA CONTRABAND FORFEITURE ACT.

§60A-7-701. Short title.

1 [Repealed.]

§60A-7-702. Legislative findings.

1 [Repealed.]

§60A-7-703. Items subject to forfeiture; persons authorized to seize property subject to forfeiture.

1 [Repealed.]

§60A-7-704. Procedures for seizure of forfeitable property.

1 [Repealed.]

§60A-7-705. Procedures for forfeiture.

1 [Repealed.]

§60A-7-705a. Additional procedures for forfeiture.

1 [Repealed.]

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

1 [Repealed.]

§60A-7-707. Disposition of other forfeited property; distribution of proceeds.

1 [Repealed.]

§60A-7-708. Bookkeeping procedures and internal controls.

1 [Repealed.]

ARTICLE 12. CRIMINAL FORFEITURE PROCESS ACT.

§60A-12-1. Short title and application.

1 This article may be cited as the Criminal Forfeiture Process Act. It shall apply to the seizure and
2 forfeiture of property used in and derived directly from the crime involving controlled substances.

§60A-12-2. Definitions.

1 The terms defined in this section have the following meanings in this chapter:

2 "Abandoned property" means personal property left by an owner who relinquishes all rights to its
3 control. Real property may not be abandoned.

4 "Actual knowledge" means direct and clear awareness of information, a fact, or a condition.

5 "Contraband" means goods that, in themselves, are unlawful to possess, including scheduled
6 drugs without a valid prescription and a firearm that is illegal to possess.

7 "Conveyance" means a device used for transportation. It includes a motor vehicle, trailer,
8 snowmobile, airplane, vessel, or any equipment attached to one of these devices. The term does not
9 include property that is stolen in violation of the law.

10 "Innocent owner" means an owner, an owner-in-joint-tenancy, or the defendant's heir or assigns
 11 of property subject to forfeiture who does not have actual knowledge of the use of the property in a crime
 12 that authorizes the forfeiture of property. The term does not include the defendant or a secured interest
 13 holder.

14 "Instrumentality" means property otherwise lawful to possess that is used in a crime that
 15 authorizes the forfeiture of property. It includes land, buildings, containers, conveyances, equipment,
 16 materials, products, tools, computers, computer software, telecommunications devices, firearms,
 17 ammunition, and ammunition-and-firearm accessories.

18 "Law enforcement agency" means any non-federal police force, or other local, county, or state
 19 agency that has the authority under state law to engage in seizure and forfeiture.

20 "Proceeds" means money, securities, negotiable instruments, or other means of exchange
 21 obtained from the sale of property or contraband.

22 "Prosecuting authority" means a municipal attorney, prosecuting attorney, Attorney General and
 23 other attorney acting under specific direction and authority, appointed or charged by law with the
 24 responsibility for prosecuting crime.

25 "Real Property" means land, and anything growing on, attached to, or erected on it including a
 26 building.

27 "Secured interest holder" means a person who is a secured creditor, mortgagee, lienholder, or
 28 other person who has a valid claim, security interest, mortgage, lien, leasehold, or other interest in the
 29 property subject to forfeiture. The term does not include the defendant or an innocent owner.

§60A-12-3. Purpose. Forfeiture is disfavored.

1 The purpose of this article is to:

2 (1) Deter criminal activity by reducing its economic incentives;

3 (2) Confiscate property used in the violation of the law and disgorge the fruit of illegal conduct;

4 and

5 (3) Protect the due process rights of property owners.

§60A-12-4. Jurisdiction.

- 1 (a) There shall be no civil forfeiture under this article.
- 2 (b) The court that has jurisdiction in the related criminal matter shall have jurisdiction over the
- 3 forfeiture proceeding.
- 4 (c) The forfeiture proceeding shall be part of the trial of the related crime. It shall follow a finding of
- 5 the defendant's guilt or be conducted at the court's discretion.

§60A-12-5. Seizure of personal property with process.

1 At the request of the prosecuting authority, a court may issue an ex parte order to attach, seize or
2 secure personal property for which forfeiture is sought and to provide for its custody. Application,
3 issuance, execution, and return are subject to state law and court rules.

§60A-12-6. Seizure of personal property without process.

- 1 Personal property may be seized, as part of a lawful search, without a court order if:
- 2 (1) The personal property subject to forfeiture is seized incident to a lawful arrest;
- 3 (2) The state has probable cause to believe the delay caused by the necessity of obtaining
- 4 process would result in the removal or destruction of the personal property that is forfeitable under this
- 5 chapter; or
- 6 (3) The personal property is the subject of a prior and valid judgment of forfeiture in favor of the
- 7 state.

§60A-12-7. Seizure or restraint of real property with process.

- 1 (a) Real property may not be seized or restrained without a court order.
- 2 (b) A court may not issue an order unless the defendant and any other person with a known,
- 3 issuance, execution, and return of any order are subject to state law and court interest in the property
- 4 receive proper notice and are given an opportunity for a contested hearing to determine the existence of
- 5 probable cause for the seizure.
- 6 (c) Nothing in this section prohibits the prosecuting authority from seeking a lis pendens or
- 7 restraining order to hinder the sale or destruction of real property. However, if the prosecuting authority

8 obtains a lis pendens or restraining order, the prosecuting authority shall notify the defendant and any
9 other person with a known interest in the property within 30 days.

10 (d) Notice may be made by publication if personal service has not been realized after reasonable
11 attempts.

12 (e) Application, filing, issuance, execution and return of any order are subject to state law and
13 court rules.

§60A-12-8. Stolen Property and Contraband.

1 No property right exists in stolen property or contraband. They are subject to seizure and shall be
2 returned or disposed of according to state law.

§60A-12-9. Receipt.

1 When property is seized, the law-enforcement officer shall give an itemized receipt to the person
2 possessing the property at the time of the seizure. If the person possessing the property is not present,
3 the law-enforcement officer will leave a receipt in the place where the property was found, if reasonably
4 possible. The receipt constitutes notice of seizure.

§60A-12-10. Property exempt from seizure and forfeiture.

- 1 (a) Homesteaded real property is exempt from seizure and forfeiture.
- 2 (b) U.S. currency totaling \$200 or less is exempt from seizure and forfeiture.
- 3 (c) A motor vehicle of less than \$2,000 in market value is exempt from seizure and forfeiture.
- 4 (d) The prosecuting authority shall advise the publications that law enforcement agencies may
5 use to establish the value of a motor vehicle in the prosecuting authority's jurisdiction.
- 6 (e) A prosecuting authority may establish a minimum-dollar amount larger than those in
7 subsections (b) and (c) of this section in the prosecuting authority's jurisdiction.

§60A-12-11. Waiver prohibition.

- 1 (a) A law-enforcement officer, other than the prosecuting authority, may not request, require, or
2 induce a person to waive, for purpose of forfeiture, the person's interest in property.
- 3 (b) A document purporting to waive interest or rights in seized property is void and inadmissible in

4 court.

§60A-12-12. Title.

1 (a) Title to the property subject to forfeiture vests with the state when the court issues a forfeiture
2 judgment and relates back to the time when the state seizes or restrains the property.

3 (b) Title to substitute assets vests when the court issues an order forfeiting substitute assets.

§60A-12-13. Counsel.

1 (a) If a claimant-defendant in a criminal matter is represented by a public defender or other
2 counsel appointed by the court, the public defender or counsel shall represent the defendant in the
3 forfeiture proceeding and any other related criminal proceeding.

4 (b) If the defendant or an innocent owner claimant engages in pro se representation in the
5 forfeiture proceeding before a judge, the court is not bound by rules of pleading, procedure, or evidence.

§60A-12-14. Notice to other known owners.

1 (a) The prosecuting authority shall perform a reasonable search of public records to identify any
2 person, other than the defendant, known to have an interest in the property subject to forfeiture.

3 (b) The prosecuting authority shall give notice to any person identified to have an interest in the
4 property subject to forfeiture, who is not charged or indicted. Notice must be given as provided by the
5 rules of the court.

6 (c) The following language substantially and conspicuously must appear in the notice:

7 "WARNING: You may lose the right to be heard in court if you do not file promptly a statement of
8 interest or ownership. You do not have to pay a filing fee to file your notice."

9 (d) If notice is not served on any persons appearing to have an interest in the property and no
10 time extension is granted or the extension period has expired, the prosecuting authority or court shall
11 order the return of the property to the person who makes a request. Contraband shall not be returned.

§60A-12-15. Prompt post-seizure hearing.

1 (a) Following seizure, a defendant, or any other person with an interest in the property has a right
2 to a prompt post-seizure hearing.

3 (b) A person with an interest in the property may petition the court for a hearing.

4 (c) At the court's discretion, the court may hold a prompt post-seizure hearing:

5 (1) As a separate hearing; or

6 (2) At the same time as a probable-cause determination, a post-arraignment/omnibus hearing or
7 other pretrial hearing.

8 (d) A party, by agreement or for good cause, may move for one extension of no more than 10
9 days. Any motion may be supported by affidavits or other submissions.

10 (e) The court shall order the return of property if it finds:

11 (1) The seizure was invalid;

12 (2) A criminal charge has not been filed and no extension of the filing period is available;

13 (3) The property is not reasonably required to be held as evidence;

14 (4) The final judgment likely will be in favor of the defendant or any other person with an
15 interest in the property; or

16 (5) The property is the only reasonable means for the defendant to pay for legal representation
17 unless the prosecuting authority shows by clear and convincing evidence the property is the
18 instrumentality of or proceeds derived directly of the crime for which the defendant is charged.

19 (f) At the court's discretion, it may order the return of enough funds and property, not needed as
20 evidence, for the defendant to obtain counsel of choice but less than the total amount seized.

21 (g) The provisions of this section do not apply to contraband.

§60A-12-16. Charging document.

1 (a) In any case in which the state seeks forfeiture of property, other than §60A-12-17 of this code,
2 the prosecuting authority shall include the following information in a charging document:

3 (1) A description of the property seized;

4 (2) The time, date, and place of the seizure; and

5 (3) A description of how the property was used in or derived from the alleged crime.

6 (b) The prosecuting authority may allege the forfeiture of property as a sanction related to the

7 crime for which the defendant is charged, as part of sentencing consideration, or through other means to
8 effectuate the criminal forfeiture of property.

9 (c) The state, with the consent of the court and a defendant with an interest in the property, may
10 amend the charging document or file an ancillary charge alleging that property is subject to criminal
11 forfeiture at any time prior to trial.

12 (d) The court may grant an unlimited number of 90-day extensions for the filing of a criminal
13 charge if, for each extension, the court determines probable cause is shown and additional time is
14 warranted.

15 (e) The prosecuting authority shall serve the charging document or amendment as provided by
16 the rules of the court.

17 (f) The court shall order the return of the property to the owner if the prosecuting authority does
18 not file a charging document as provided by the court's rules, the period of an extension expires, or the
19 court does not grant an extension.

§60A-12-17.

Indictment.

1 (a) In a case that the state seeks forfeiture of property, other than §60A-12-16 of this code, the
2 prosecuting authority shall present evidence to a grand jury supporting an indictment that includes:

3 (1) A proposed criminal charge; and

4 (2) An allegation for which forfeiture of property may be ordered.

5 (b) The property-related allegation may be presented as a sanction related to the crime for which
6 the defendant is charged, as part of sentencing consideration, or other means to effectuate the criminal
7 forfeiture of property.

8 (c) The property-related allegation shall identify the specific property to be forfeited, if known, or
9 the relevant forfeiture statutes, if specific property to be forfeited is not known at the time of the
10 prosecuting authority requests the indictment.

11 (d) Upon application of the prosecuting authority, the court may enter a restraining order or
12 injunction, or take other action to preserve the availability of property only:

13 (1) Upon the issuance of an indictment according to paragraph A; or

14 (2) Prior to the issuance of an indictment, if the court determines there is a substantial probability
15 the state will prevail on the issue of criminal forfeiture and that failure to enter the order will result in
16 property being destroyed, removed from the jurisdiction, or otherwise made unavailable for forfeiture.

17 (e) Any order entered pursuant to subsection (D)(2) of this section shall be effective for not more
18 than 90 days, unless extended by the court for good cause shown or an indictment described in
19 subsection (d)(1) of this section has been issued subsequently.

§60A-12-18. Discovery.

1 Discovery related to the forfeiture proceeding is subject to the rules of criminal procedure.

§60A-12-19. Trial, conviction required and standard of proof.

1 (a) Property may be forfeited if:

2 (1) The state secures a conviction of a crime that authorizes the forfeiture of property; and

3 (2) The state establishes by clear and convincing evidence the property is an instrumentality of or
4 proceeds derived directly from the crime for which the state secured a conviction.

5 (b) Except as required by §60A-12-10 of this code, nothing in this article prevents property from
6 being forfeited as part of:

7 (1) A plea agreement; or

8 (2) A grant of immunity or reduced punishment, with or without the filing of a criminal charge, in
9 exchange for testifying or assisting a law-enforcement investigation or prosecution.

10 (c) A forfeiture proceeding of property of less than \$10,000 in value may be held before only a
11 judge.

12 (d) The prosecuting authority may file an ex parte notice, under seal, with the court notifying the
13 court of the underlying reason for granting immunity, reducing punishment, or not filing a charge. The
14 judge may consider this notice in awarding title to the property to the state.

§60A-12-20. Exceptions to the conviction requirement.

1 (a) The court may waive the conviction requirement and grant permanent title of the property to

2 the state if the prosecuting authority files a motion no fewer than 90 days after seizure and shows by
3 clear and convincing evidence that, before conviction, the defendant:

- 4 (1) Died;
- 5 (2) Was deported by the U.S. government;
- 6 (3) Abandoned the property; or
- 7 (4) Fled the jurisdiction.

8 (b) Notwithstanding provisions in §60A-12-19 of this code and this section, all property remains
9 subject to:

- 10 (1) Claims by a person, other than the defendant, with an interest in the property as provided in
11 this article;
- 12 (2) Distribution of forfeited property according to §60A-12-31 of this code;
- 13 (3) Reporting requirements.

§60A-12-21. Proportionality.

1 (a) The defendant may petition the court to determine, before or at trial, whether the forfeiture is
2 unconstitutionally excessive under the State or Federal Constitution.

3 (b) The defendant has the burden of establishing the forfeiture is unconstitutionally excessive by
4 a preponderance of the evidence at a hearing conducted by the court without a jury.

5 (c) In determining whether the forfeiture is unconstitutionally excessive, the court may consider
6 all relevant factors including:

- 7 (1) The seriousness of the crime and its impact on the community, including the duration of the
8 activity and harm caused by the defendant;
- 9 (2) The extent to which the defendant participated in the crime;
- 10 (3) The extent to which the property was used in committing the crime;
- 11 (4) The sentence imposed for committing the crime;
- 12 (5) Whether the crime was completed or attempted;
- 13 (6) The hardship to the defendant if the forfeiture is realized and if the forfeiture would deprive the

14 defendant of the defendant's livelihood; and

15 (7) The hardship from the loss of property to the defendant's family members or others if the
16 property is forfeited.

17 (d) In determining the value of the instrumentality subject to forfeiture, the court may consider all
18 relevant factors related to the fair market value of the property.

19 (e) The court may not consider the value of the property to the state in determining whether the
20 forfeiture is unconstitutionally excessive.

§60A-12-22. Secured interest holder.

1 (a) Property encumbered by a security interest shall not be forfeited.

2 (b) The prosecuting authority summarily shall return property to a secured interest holder, other
3 than the defendant or an innocent owner, up to the value of the interest. Contraband shall not be
4 returned.

5 (c) If the property is not summarily returned, the secured interest holder may petition the court at
6 any time before the court enters judgment in the criminal prosecution or grants the motion in §60A-12-20
7 of this code.

8 (d) The court shall hear the petition within 30 days after its filing or at the court's discretion. The
9 hearing shall be held before the court alone, without a jury. The court may consolidate the hearing on the
10 petition with any other hearing before the court in the case.

11 (e) The secured interest holder must establish by clear and convincing evidence the validity of the
12 security interest, mortgage, lien, leasehold, lease, rental agreement, or other agreement.

13 (f) If the secured interest holder alleges a valid interest but the prosecuting authority seeks to
14 proceed, the prosecuting authority shall prove by clear and convincing evidence that:

15 (1) The interest is invalid; or

16 (2) The secured interest holder consented to the use of the property in the crime for which the
17 defendant is charged.

18 (g) If the state fails to meet its burden in subsection (f) of this section, the court shall order the

19 state to relinquish claims to the property, up to the value of the interest, and return the interest to the
20 secured interest holder.

§60A-12-23. Innocent owner.

1 (a) Property of an innocent owner shall not be forfeited.

2 (b) The prosecuting authority summarily shall return property to an innocent owner. Contraband
3 shall not be returned.

4 (c) If the property is not summarily returned, an innocent owner claimant may petition the court at
5 any time before the court enters judgment in the criminal prosecution or grants the motion in section
6 §60A-12-20 of this code.

7 (d) The innocent owner claimant shall file with the court a simple statement that sets forth:

8 (1) The claimant's right, title, or interest in the property;

9 (2) The time and circumstances of the claimant's acquisition of the interest in the property;

10 (3) Additional facts supporting the claimant's claim; and

11 (4) The relief sought by the claimant.

12 (e) The filing fee for the statement under this section is waived.

13 (f) The court shall hear the petition within 30 days after its filing or at the court's discretion. The
14 hearing shall be held before the court alone without a jury. The court may consolidate the hearing on the
15 petition with any other hearing before the court in the case.

16 (g) The claimant must establish by clear and convincing evidence the validity of the interest in the
17 property.

18 (h) If subsection (g) of this section is satisfied and the prosecuting authority seeks to proceed, the
19 prosecuting authority shall prove by clear and convincing evidence the claimant is not an innocent owner
20 because:

21 (1) The claimant's interest in the property is invalid;

22 (2) The claimant had actual knowledge the property was used in or derived directly from the crime
23 for which the defendant is charged;

24 (3) The claimant was willfully blind to the crime for which the defendant is charged; or

25 (4) The claimant was not a bona fide purchaser without notice of any defect in title and for
26 valuable consideration.

27 (i) If the prosecuting authority fails to meet its burden in subsection (h) of this section, the court
28 shall order the state to relinquish all claims and return the property to the innocent owner.

29 (j) No information in the claimant's statement in subsection (d) of this section shall be used as
30 evidence in the criminal portion of the case.

31 (k) Nothing in this section prohibits the claimant from providing information to any party or
32 testifying in any trial as to facts the claimant knows.

33 (l) The defendant or convicted offender may invoke the right against self-incrimination or the
34 marital privilege during the forfeiture proceeding. The trier of fact may draw an adverse inference from
35 the invocation of the right or privilege.

§60A-12-24. Judgment.

1 (a) If the prosecuting authority fails to meet its burden as to any claim in the criminal or forfeiture
2 proceeding, the court shall enter judgment dismissing the forfeiture proceeding and ordering the return of
3 property to the rightful owner, unless the owner's possession of the property is illegal.

4 (b) If the prosecuting authority meets its burden as to all claims, the court shall enter judgment
5 forfeiting the property.

6 (c) A court may enter judgment following a hearing, pursuant to a stipulation or plea agreement,
7 or at the court's discretion.

§60A-12-25. Substitution of assets.

1 Upon the prosecuting authority's motion following conviction or at the court's discretion, the court
2 may order the forfeiture of substitute property owned solely by the defendant up to the value of property
3 that is beyond the court's jurisdiction or cannot be located through due diligence, only if the state proves
4 by a preponderance of the evidence that the defendant intentionally:

5 (1) Dissipated the property;

4 (b) The rightful owner may not be subject to any expenses related to towing, storage, or
5 preservation of the property.

6 (c) The law-enforcement agency that holds the property is responsible for any damages, storage
7 fees, and related costs applicable to property returned under this section.

§60A-12-31. Disposition of property and proceeds.

1 (a) At any time when contraband is no longer needed as evidence, the court may order it be
2 destroyed pursuant to state law.

3 (b) At any time when abandoned property or property seized from a defendant who flees the
4 jurisdiction is no longer needed as evidence, the court may order it be sold.

5 (c) If the forfeiture is granted, the court shall order the sale of forfeited property other than
6 currency.

7 (d) The court may order, upon exhaustion of all appeals or at its discretion, forfeited currency and
8 sale proceeds to:

9 (1) Pay restitution to the victim related to the underlying criminal offense;

10 (2) Satisfy recorded liens, mortgages or filed security interests in the forfeited property;

11 (3) Pay reasonable costs for the towing, storage, maintenance, repairs, advertising, and sale,
12 and other operating costs related to the forfeited property;

13 (4) Reimburse the seizing law-enforcement agency for nonpersonnel operating costs, including
14 controlled-drug buy money, related to the investigation of the underlying criminal offense.

15 (e) After disbursements under paragraph (d), the court shall order the reimburse the seizing law-
16 enforcement agency for the salaries, benefits and overtime pay of uniformed personnel expended in the
17 seizure of the property and investigation of the underlying criminal offense.

18 (f) After disbursement under paragraph (e), the court shall distribute remaining funds to:

19 (1) The Department of Homeland Security to supplement existing statewide grants to law-
20 enforcement agencies; and

21 (2) The state's general fund.

§60A-12-32. Sale restrictions.

1 No law-enforcement agency may sell forfeited property directly or indirectly to any
2 employee of the law-enforcement agency, to a person related to an employee by blood or
3 marriage, or to another law-enforcement agency.

§60A-12-33. Preemption.

1 This article preempts laws by towns, municipal, county, and other governments in the state
2 which may regulate civil and criminal forfeiture.

§60A-12-34. Limitation on federal adoption.

1 (a) A law-enforcement agency may not offer for adoption property, seized under state law,
2 to a federal agency for the purpose of forfeiture under the federal Controlled Substances Act,
3 Public Law 91-513- ct. 27, 1970.

4 (b) Nothing in paragraph (a) should be construed to limit state and local agencies from
5 participating in joint task forces with the federal government.

§60A-12-35. Guidance.

1 (a) A prosecuting authority, after consulting with the responsible U.S. Attorney, shall
2 establish guidelines for joint task forces and multijurisdictional collaboration in the prosecuting
3 authority's jurisdiction.

4 (b) The Department of Homeland Security or Prosecuting Attorneys Institute, from time to
5 time, shall publish best practices and offer training on seizure and forfeiture under this chapter.

NOTE: The purpose of this bill is to create the Criminal Forfeiture Process Act, replacing the West Virginia Contraband Forfeiture Act.

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