

1 **ENROLLED**

2 **Senate Bill No. 606**

3 (BY SENATORS PALUMBO, UNGER, JENKINS, KLEMPA AND FOSTER)

4 _____
5 [Passed March 10, 2012; in effect ninety days from passage.]
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10 AN ACT to amend and reenact §60A-7-706 of the Code of West
11 Virginia, 1931, as amended; and to amend said code by adding
12 thereto six new sections, designated §61-8C-6, §61-8C-7, §61-
13 8C-8, §61-8C-9, §61-8C-10 and §61-8C-11, all relating to
14 forfeiture of certain property; correcting a technical error;
15 stating legislative findings; providing for the forfeiture of
16 certain materials related to recording sexually explicit
17 conduct of minors or soliciting minors; establishing a
18 procedure for seizure of forfeitable property; creating
19 procedures for forfeiture; setting process for disposition and
20 distribution of forfeited moneys, securities and negotiable
21 instruments; and creating process for disposition and
22 distribution of other forfeited properties.

23 *Be it enacted by the Legislature of West Virginia:*

24 That §60A-7-706 of the Code of West Virginia, 1931, as

1 amended, be amended and reenacted; and that said code be amended by
2 adding thereto six new sections, designated §61-8C-6, §61-8C-7,
3 §61-8C-8, §61-8C-9, §61-8C-10 and §61-8C-11, all to read as
4 follows:

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

6 **ARTICLE 7. WEST VIRGINIA CONTRABAND FORFEITURE ACT.**

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

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

12 (1) Ten percent of the proceeds shall be tendered to the
13 office of the prosecuting attorney which initiated the forfeiture
14 proceeding;

15 (2) The balance shall be deposited in a special law-
16 enforcement investigation fund. The fund may be placed in any
17 interest-bearing depository insured by an agency of the federal
18 government. The fund shall be administered by the chief of the
19 law-enforcement agency that seized the forfeited property.

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

22 (1) In the case of the funds belonging to the State Police,
23 the funds shall only be expended at the direction of the
24 Superintendent of the State Police and in accordance with the

1 provisions of article two, chapter eleven-b of this code and the
2 provisions of subdivision (10), subsection (b), section two,
3 article two, chapter twelve of this code;

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

9 (3) In the case of funds belonging to the police department of
10 any municipality in which the special fund has been created, the
11 funds therein may only be expended in the manner provided in
12 section twenty-two, article thirteen, chapter eight of this code.

13 **CHAPTER 61. CRIMES AND THEIR PUNISHMENT.**

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

15 **§61-8C-6. Legislative findings.**

16 The Legislature hereby finds and declares that the seizure and
17 sale of items under the provisions of this article is not
18 contemplated to be a forfeiture as the same is used in article
19 twelve, section five of the West Virginia Constitution and to the
20 extent that such seizure and sale may be found to be such a
21 forfeiture, the Legislature hereby finds and declares that the
22 proceeds from a seizure and sale under this article is not part of
23 net proceeds as the same is contemplated by such article twelve,
24 section five of the West Virginia Constitution.

1 **§61-8C-7. Items subject to forfeiture; persons authorized to seize**
2 **property subject to forfeiture.**

3 (a) The following are subject to forfeiture:

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

8 (2) All raw materials, products and equipment of any kind
9 which are used, or intended for use, in manufacturing, processing,
10 delivering, importing or exporting any visual depictions or any
11 crimes against children in violation of article eight-a or eight-c
12 of this chapter or section fourteen-b, article three-c of this
13 chapter;

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

19 (4) All moneys, negotiable instruments, securities or other
20 things of value furnished or intended to be furnished in violation
21 of articles eight-a or eight-c of this chapter or section fourteen-
22 b, article three-c of this chapter by any person in exchange for a
23 visual depiction, all proceeds traceable to the exchange and all
24 moneys, negotiable instruments and securities used, or which are

1 intended to be used, to facilitate any violation of article eight-a
2 or eight-c of this chapter or section fourteen-b, article three-c
3 of this chapter: *Provided*, That no property may be forfeited under
4 this subdivision, to the extent of the interest of an owner, by
5 reason of any act or omission established by that owner to have
6 been committed or omitted without his or her knowledge or consent;
7 and

8 (5) All conveyances, including aircraft, vehicles or vessels,
9 which are used, have been used, or are intended for use, to
10 transport, or in any manner to facilitate the transportation, sale,
11 receipt, possession or concealment of property described in
12 subdivision (1), (2) or (3) of this subsection, except that:

13 (A) A conveyance used by any person as a common carrier in the
14 transaction of business as a common carrier shall not be forfeited
15 under this section unless it appears that the person owning the
16 conveyance is a consenting party or privy to a violation of article
17 eight-a or eight-c of this chapter or section fourteen-b, article
18 three-c of this chapter;

19 (B) A conveyance shall not be forfeited under the provisions
20 of this article if the person owning the conveyance establishes
21 that he or she neither knew, nor had reason to know, that the
22 conveyance was being employed or was likely to be employed in a
23 violation of article eight-a or eight-c of this chapter or section
24 fourteen-b, article three-c of this chapter; and

1 (C) A bona fide security interest or other valid lien in any
2 conveyance shall not be forfeited under the provisions of this
3 article, unless the state proves by a preponderance of the evidence
4 that the holder of the security interest or lien either knew, or
5 had reason to know, that the conveyance was being used or was
6 likely to be used in a violation of article eight-a or eight-c of
7 this chapter or section fourteen-b, article three-c of this
8 chapter.

9 (b) Property subject to forfeiture under this article may be
10 seized by the State Police (hereinafter referred to as the
11 "appropriate person" in this article).

12 (c) Visual depictions which are manufactured, possessed,
13 transferred, sold or offered for sale in violation of this article
14 are contraband and shall be seized and summarily forfeited to the
15 state. Visual depictions which are seized or come into the
16 possession of the state, the owners of which are unknown, are
17 contraband and shall be summarily forfeited to the state upon the
18 seizure of the visual depictions.

19 (d) Notwithstanding any other provisions of this article to
20 the contrary, any items of tangible personal property sold to a
21 bona fide purchaser are not subject to forfeiture unless the state
22 establishes by clear and convincing proof that the bona fide
23 purchaser knew or should have known that the property had in the
24 previous three years next preceding the sale been used in violation

1 of this chapter.

2 (e) Notwithstanding any other provisions of this code to the
3 contrary, any person who has an ownership interest in items of
4 tangible personal property subject to forfeiture by this article
5 shall be presumed to be an innocent owner. Unless the state
6 establishes by clear and convincing proof that the innocent owner
7 knew or should have known that the property subject to forfeiture
8 had been used in violation of article eight-a or eight-c of this
9 chapter or section fourteen-b, article three-c of this chapter and,
10 if applicable, that the innocent owner did not do all that
11 reasonably could be expected under the circumstances to terminate
12 the illegal use of the property once he or she had knowledge of it,
13 the court shall enter an order either: (1) Severing the property
14 appropriately; (2) transferring the property to the state with a
15 provision that the state shall compensate the innocent owner to the
16 extent of his or her ownership interest once a final order of
17 forfeiture has been entered and the property has been reduced to
18 liquid assets; or (3) permitting the innocent owner to retain the
19 property subject to a lien in favor of the state to the extent of
20 the forfeitable interest in the property. If the state meets the
21 burden set forth in this section, then the court shall enter an
22 order declaring the person with an ownership interest is not an
23 innocent owner and allowing forfeiture proceedings to continue,
24 pursuant to the requirements set forth in this article.

1 **§61-8C-8. Procedures for seizure of forfeitable property.**

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

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

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

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

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

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

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

22 (d) Property taken or detained under this section shall not be
23 subject to replevin, but is deemed to be in the custody of the
24 appropriate person, subject only to the orders and decrees of the

1 court having jurisdiction over the forfeiture proceedings. When
2 property is seized under this article, the appropriate person may:

3 (1) Place the property under seal;

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

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

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

11 **§61-8C-9. Procedures for forfeiture.**

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

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

23 (3) Any civil trial stemming from a petition for forfeiture
24 brought under this article at the demand of either party shall be

1 by jury.

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

8 (A) A description of the property seized;

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

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

11 (D) The identity of the owner or owners of the property, if
12 known;

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

15 (F) A statement of facts upon which probable cause for belief
16 that the seized property is subject to forfeiture pursuant to the
17 provisions of this article is based;

18 (G) The identity of all persons or corporations having a
19 perfected security interest or lien in the subject property, as
20 well as the identity of all persons or corporations known to the
21 affiant who may be holding a possessory or statutory lien against
22 such property; and

23 (H) A prayer for an order directing forfeiture of the seized
24 property to the state, and vesting ownership of such property in

1 the state.

2 (b) At the time of filing or as soon as practicable
3 thereafter, a copy of the petition for forfeiture shall be served
4 upon the owner or owners of the seized property, as well as all
5 holders of a perfected security interest or lien or of a possessory
6 or statutory lien in the same class, if known. Should diligent
7 efforts fail to disclose the lawful owner or owners of the seized
8 property, a copy of the petition for forfeiture shall be served
9 upon any person who was in possession or alleged to be in
10 possession of the property at the time of seizure, where such
11 person's identity is known. The above service shall be made
12 pursuant to the provisions of the West Virginia Rules of Civil
13 Procedure. Any copy of the petition for forfeiture so served shall
14 include a notice substantially as follows: "To any claimant to the
15 within described property: You have the right to file an answer to
16 this petition setting forth your title in, and right to possession
17 of, the property within thirty days from the service hereof. If
18 you fail to file an answer, a final order forfeiting the property
19 to the state will be entered, and such order is not subject to
20 appeal."

21 If no owner or possessors, lien holders or holders of a
22 security interest be found, then such service may be by Class II
23 legal publication in accordance with the provisions of article
24 three, chapter fifty-nine of this code, and the publication area

1 shall be the county wherein such property was located at the time
2 of seizure and the county wherein the petition for forfeiture is
3 filed.

4 (c) In addition to the requirements of subsection (b) above,
5 the prosecuting attorney or law-enforcement officer upon whose oath
6 or affirmation the petition for forfeiture is based, shall be
7 responsible for the publication of a further notice. Such further
8 notice that a petition for forfeiture has been filed shall be
9 published by Class II legal advertisement in accordance with
10 article three, chapter fifty-nine of this code. The publication
11 area shall be the county wherein the property was seized and the
12 county wherein the petition for forfeiture is filed. The notice
13 shall advise any claimant to the property of their right to file a
14 claim on or before the date set forth in the notice, which date
15 shall not be less than thirty days from the date of the first
16 publication. The notice shall specify that any claim must clearly
17 state the identity of the claimant and an address where legal
18 process can be served upon that person. In addition such notice
19 shall contain the following information:

- 20 (1) A description of the property seized;
- 21 (2) A statement as to who is responsible for the seizure;
- 22 (3) A statement of the time and place of seizure;
- 23 (4) The identity of the owner or owners of the property, if
24 known;

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

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

6 (d) If no answer or claim is filed within thirty days of the
7 date of service of the petition pursuant to subsection (b) of this
8 section, or within thirty days of the first publication pursuant to
9 subsection (b) of this section, the court shall enter an order
10 forfeiting the seized property to the state. If any claim to the
11 seized property is timely filed, a time and place shall be set for
12 a hearing upon such claim. The claimant or claimants shall be
13 given notice of such hearing not less than ten days prior to the
14 date set for the hearing.

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

19 (f) Any order forfeiting property to the state and entered
20 pursuant to this section perfects the state's right, title and
21 interest in the forfeited property and relates back to the date of
22 seizure: *Provided*, That in any proceeding under this article the
23 circuit court shall in its final order make specific findings with
24 respect to whether or not probable cause to seize such property

1 existed at the time of such seizure.

2 (g) During the pendency of a forfeiture proceeding, it is
3 unlawful for any property owner or holder of a bona fide security
4 interest or other valid lien holder to transfer or attempt to
5 transfer any ownership interest or security interest in seized
6 property with the intent to defeat the purpose of this article, and
7 the court wherein the petition for forfeiture is filed may enjoin
8 a property owner or holder of a security interest or other lien
9 holder from making such a transfer should one come to its
10 attention. Any such transfer which is made in violation of the
11 provisions of this subsection shall have no effect upon an order of
12 the court forfeiting seized property to the state if a notice of
13 lis pendens is filed prior to the recording of the instrument of
14 transfer.

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

19 (i) An appeal of a decision of the circuit court concerning a
20 forfeiture proceeding brought pursuant to this chapter must be
21 filed within one hundred twenty days of the date of entry of the
22 final appealable order. The appellant shall be required to give
23 notice of intent to appeal within thirty days of the entry of such
24 appealable order.

1 **§61-8C-10. Disposition of forfeited moneys, securities or other**
2 **negotiable instruments; distribution of proceeds.**

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

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

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

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

16 (1) In the case of funds belonging to the State Police, the
17 funds shall only be expended at the direction of the Superintendent
18 of the State Police and in accordance with the provisions of
19 article two, chapter eleven-b of this code and the provisions of
20 subdivision (10), subsection (b), section two, article two, chapter
21 twelve of this code;

22 (2) In the case of funds belonging to the office of the
23 prosecuting attorney of any county in which the special fund has
24 been created, the funds therein may only be expended in the manner

1 provided in sections four and five, article five, chapter seven of
2 this code; and

3 (3) In the case of funds belonging to the police department of
4 any municipality in which the special fund has been created, the
5 funds therein may only be expended in the manner provided in
6 section twenty-two, article thirteen, chapter eight of this code.

7 **§61-8C-11. Disposition of other forfeited property; distribution**
8 **of proceeds.**

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

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

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

18 (3) The forfeited property shall be offered at public auction
19 to the highest bidder for cash. Notice of such public auction
20 shall be published as a Class III legal advertisement in accordance
21 with article three, chapter fifty-nine of this code. The
22 publication area shall be the county where the public auction will
23 be held.

24 (b) When a law-enforcement agency receives property pursuant

1 to this section, the court may, upon request of the prosecuting
2 attorney initiating the forfeiture proceeding, require the law-
3 enforcement agency to pay unto the office of said prosecuting
4 attorney a sum not to exceed ten percent of the value of the
5 property received to compensate said office for actual costs and
6 expenses incurred.

7 (c) The proceeds of every public sale conducted pursuant to
8 this section shall be paid and applied as follows: First, to the
9 balance due on any security interest preserved by the court;
10 second, to the costs incurred in the storage, maintenance and
11 security of the property; and third, to the costs incurred in
12 selling the property.

13 (d) Any proceeds of a public sale remaining after distribution
14 pursuant to subsection (c) of this section shall be distributed as
15 follows:

16 (1) Ten percent of such proceeds shall be tendered to the
17 office of the prosecuting attorney who initiated the forfeiture
18 proceeding.

19 (2) The balance shall be deposited in a special law-
20 enforcement investigation fund. Such fund shall be administered by
21 the Superintendent of the State Police or his or her designee and
22 shall take the form of an interest-bearing account with any
23 interest earned to be compounded to the fund. Any funds deposited
24 in the special law-enforcement investigative fund pursuant to this

1 article shall be expended only to defray the costs of protracted or
2 complex investigations, to provide additional technical equipment
3 or expertise, to provide matching funds to obtain federal grants or
4 for such other law-enforcement purposes as the Superintendent of
5 the State Police or his or her designee may deem appropriate;
6 however, these funds may not be utilized for regular operating
7 needs.

8 (e) If more than one law-enforcement agency was substantially
9 involved in effecting the seizure and forfeiture of property, the
10 court wherein the petition for forfeiture was filed shall equitably
11 distribute the forfeited property among the law-enforcement
12 agencies. In the event of a public sale of such property pursuant
13 to subsection (a) of this section, the court shall equitably
14 distribute any proceeds remaining after distribution pursuant to
15 subsection (c) and subdivision (1), subsection (d) of this section
16 among such law-enforcement agencies for deposit into their
17 individual special law-enforcement investigative fund. Equitable
18 distribution shall be based upon the overall contribution of the
19 individual law-enforcement agency to the investigation which led to
20 the seizure.

21 (f) Upon the sale of any forfeited property for which title or
22 registration is required by law, the state shall issue a title or
23 registration certificate to any bona fide purchaser at a public
24 sale of the property conducted pursuant to subsection (a) of this

1 section. Upon the request of the law-enforcement agency receiving,
2 pursuant to the order of the court, or electing to retain, pursuant
3 to subsection (a) of this section, any forfeited property for which
4 title or registration is required by law, the state shall issue a
5 title or registration certificate to the appropriate governmental
6 body.

7 (g) Any funds expended pursuant to the provisions of this
8 section shall only be expended in the manner provided in subsection
9 (b), section ten of this article.

10 (h) Every prosecuting attorney or law-enforcement agency
11 receiving forfeited property or proceeds from the sale of forfeited
12 property pursuant to this article shall submit an annual report to
13 the body which has budgetary authority over such agency. Such
14 report shall specify the type and approximate value of all
15 forfeited property and the amount of proceeds from the sale of
16 forfeited property received in the preceding year. No county or
17 municipality may use anticipated receipts of forfeited property in
18 their budgetary process.

19 (i) In lieu of the sale of any forfeited property subject to
20 a bona fide security interest preserved by an order of the court,
21 the law-enforcement agency receiving the forfeited property may pay
22 the balance due on any security interest preserved by the court
23 from funds budgeted to the office or department or from the special
24 fund and retain possession of the forfeited property for official

1 use pursuant to subsection (a) of this section.

2 (j) In every case where property is forfeited, disposition of
3 the forfeited property, in accordance with this article, shall be
4 made within six months of the date upon which the court of
5 jurisdiction orders forfeiture. Should the office or agency
6 receiving the property fail either to place the property in
7 official use or dispose of the property in accordance with law, the
8 court of jurisdiction shall cause disposition of the property to be
9 made with any proceeds therefrom to be awarded to the state.

10 (k) No disposition shall occur until all applicable periods
11 for filing a notice of intent to appeal has expired and no party in
12 interest shall have filed such notice. The filing of the notice of
13 intent to appeal shall stay any such disposition until the appeal
14 has been finally adjudicated or until the appeal period of one
15 hundred eighty days has expired without an appeal having actually
16 been taken or filed, unless a valid extension of the appeal has
17 been granted by the circuit court under the provisions of section
18 seven, article four, chapter fifty-eight of this code.

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