

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

House Bill 2547

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Kirby, Kimble, Martin, Nestor, Longanacre

[Introduced January 13, 2023; 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 §62-17-1, §62-17-2, §62-17-3, §62-17-4, §62-17-5, §62-17-6, §62-17-7, §62-
 3 17-8, §62-17-9, §62-17-10, §62-17-11, §62-17-12, §62-17-13, §62-17-14, §62-17-15, §62-
 4 17-16, §62-17-17, §62-17-18, §62-17-19, §62-17-20, §62-17-21, §62-17-22, §62-17-23,
 5 §62-17-24, §62-17-25, §62-17-26, §62-17-27, §62-17-28, and §62-17-29, all relating to the
 6 criminal forfeiture process act; titling the act; establishing applicability; defining terms;
 7 establishing the process for seizure; requiring a conviction for forfeiture; defining
 8 jurisdiction; establishing restraints and exceptions for seizure; creating exceptions;
 9 establishing the process for secured interest holders and property owned by innocent
 10 parties; establishing the process for property covered by a lien; establishing the process
 11 for payment of fees and costs; and creating sales restrictions.

Be it enacted by the Legislature of West Virginia:

ARTICLE 17. CRIMINAL FORFEITURE PROCESS ACT.

§62-17-1. Title and purpose; applicability.

1 (a) This article shall be known as the Criminal Forfeiture Process Act. Notwithstanding any
 2 other provision of the code to the contrary, it shall apply to the seizure and forfeiture of property
 3 used in and derived from the commission of a crime in the State of West Virginia.

4 (b) In the event of conflict between this article and any other provision of law regarding the
 5 seizure of forfeiture of property, this section shall govern to the extent of the conflict.

6 (c) This article’s purpose is to deter criminal activity by reducing its economic incentives;
 7 confiscate property used in the violation of the law and disgorge the fruit of illegal conduct; and
 8 protect the due process rights of property owners.

9 (d) The provisions of this article do not apply to the provisions of §20-2-5a or §61-8C-1 et
 10 seq. of this code.

§62-17-2. Definitions.

1 As used in this article:

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

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

6 (3) "Contraband" means goods that, in themselves, are unlawful to possess, including, but
7 not limited to, images of minor children engaged in sexually explicit conduct, scheduled drugs
8 without a valid prescription, or firearms which have been illegally modified: *Provided*, That no
9 firearm may be seized in a manner which violates the provisions of §61-7B-1, *et seq.* of this code.

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

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

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

21 (7) "Law-enforcement agency" means any nonfederal police force, or other local, county,
22 or state agency that has the authority under state law to engage in seizure and forfeiture.

23 (8) "Law-enforcement officer" means any employee of a law-enforcement agency who has
24 the authority under state law to engage in seizure and forfeiture.

25 (9) "Proceeds" means money, securities, negotiable instruments or other means of
26 exchange obtained from the sale of property or contraband.

27 (10) "Prosecuting authority" means a prosecuting attorney or his or her assistants acting

28 under the authority of §7-4-1 et seq. of this code, a municipal attorney, the Attorney General or his
29 or her assistants, and other attorney acting under specific direction and authority, appointed or
30 charged by law with the responsibility for prosecuting crime.

31 (11) "Real Property" means land and anything growing on, attached to, or erected on it
32 including a building.

33 (12) "Secured interest holder" means a person who is a secured creditor, mortgagee,
34 lienholder, or other person who has a valid claim, security interest, mortgage, lien, leasehold, or
35 other interest in the property subject to forfeiture. The term does not include the defendant or an
36 innocent owner.

§62-17-3. Jurisdiction.

1 (a) The court that has jurisdiction in the related criminal matter shall have jurisdiction over
2 the forfeiture proceeding.

3 (b) Pursuant to the provisions of this article, the forfeiture proceeding shall be part of the
4 trial of the related crime. It shall follow a finding of the defendant's guilt or be conducted at the
5 court's discretion, except as otherwise set forth in this article.

§62-17-4. Seizure of personal and real property.

1 (a) 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
5 any provision of this code; or

6 (3) The personal property is the subject of a prior and valid judgment of forfeiture in favor of
7 the state.

8 (b) Real property may not be seized or restrained without a court order.

9 (c) A court may not issue an order unless the defendant and any other person with a known
10 interest in the real property receive proper notice and are given an opportunity for a contested
11 hearing to determine the existence of probable cause for the seizure.

12 (d) Nothing in this section prohibits the prosecuting authority from seeking a lis pendens or
13 restraining order to hinder the sale or destruction of real property. However, if the prosecuting
14 authority obtains a lis pendens or restraining order, the prosecuting authority shall notify the
15 defendant and any other person with a known interest in the real property within 30 days.

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

§62-17-5. Contraband.

1 Nothing in this article shall be construed to create the existence of a property right to
2 contraband. Contraband is subject to seizure and shall be disposed of according to applicable
3 state law.

§62-17-6. Receipt.

1 When property subject to forfeiture is seized, the law-enforcement officer seizing such
2 property shall give an itemized receipt to the person possessing the property at the time of the
3 seizure. If the person owning the property is not present, the law-enforcement officer seizing the
4 property will leave a receipt in the place where the property was found, if practicable.

§62-17-7. Property exempt from seizure and forfeiture.

1 (a) Notwithstanding any provision of this code to the contrary:

2 (1) Homesteaded real property is exempt from seizure and forfeiture.

3 (2) U.S. currency totaling \$200 or less is exempt from seizure and forfeiture.

4 (3) A motor vehicle of less than \$2,000 in market value is exempt from seizure and
5 forfeiture.

6 (b) The prosecuting authority shall advise the publications that law-enforcement agencies
7 may use to establish the value of a motor vehicle in the prosecuting authority's jurisdiction.

8 (c) The prosecuting authority may establish higher values in subdivisions (a)(2) and (a)(3)
9 if the interests of justice and efficient use of governmental resources are served in the jurisdiction
10 based on the prosecuting authority's determination of:

11 (1) The type and number of occurrences of offenses that include the seizure of property;

12 and

13 (2) The average value of seized property less the costs to seize and forfeit it.

§62-17-8. Waiver prohibition.

1 (a) A law-enforcement officer, other than the prosecuting authority, may not request,
2 require or induce a person to waive, for purpose of forfeiture, the person's interest in property
3 subject to seizure and forfeiture, except for contraband.

4 (b) A document so purporting to waive interest or rights in seized property is void and
5 inadmissible in court.

§62-17-9. Title to property.

1 (a) Title to the property subject to forfeiture vests with the state when the court issues a
2 forfeiture 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
4 assets.

§62-17-10. Counsel.

1 (a) If the defendant in the criminal prosecution is represented by a court-appointed
2 attorney, the office of Public Defender Services may authorize representation of the defendant in
3 the forfeiture proceeding and any other related proceeding.

4 (b) If the defendant and any other person with an interest in the property engages in pro se
5 representation in the forfeiture-related proceeding before a judge, the court is not bound by the
6 common law, court rules of evidence, statutory rules of evidence, technical or formal rules of
7 pleading or procedure in the litigation related to the forfeiture of property.

§62-17-11. Notice to other known owners.

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

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

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

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

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

§62-17-12. Prompt post-seizure hearing.

1 (a) Following seizure, a defendant or any other person with an interest in the property has a
2 right 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
7 hearing or other pretrial hearing.

8 (d) A party, by agreement or for good cause, may move for one extension of no more than
9 10 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
17 representation unless the prosecuting authority shows by clear and convincing evidence the
18 property is the instrumentality of or proceeds derived directly of the crime for which the defendant
19 is charged.

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

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

§62-17-13. Charging document.

1 (a) In any case in which the state seeks forfeiture of property the prosecuting authority shall
2 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
7 the crime for which the defendant is charged, as part of sentencing consideration, or through other
8 means to effectuate the criminal forfeiture of property.

9 (c) The state, in accordance with the Rules of Criminal Procedure, may amend the
10 charging document or file an ancillary charge alleging that real property or personal property is
11 subject to forfeiture at any time before 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
16 provided by the rules of the court.

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

§62-17-14. Complaint or Indictment.

1 (a) In a case that the state seeks forfeiture of property, the prosecuting authority shall
2 cause the issuance of a criminal complaint or present evidence to a grand jury supporting an
3 indictment that includes:

4 (1) A proposed criminal charge; and

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

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

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

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

14 (1) Upon the issuance of a complaint or an indictment; or

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

19 (e) Any order entered pursuant to subdivision (2) of this section shall be effective for not
20 more than 90 days, unless extended by the court for good cause shown or an indictment described

21 in subdivision (d)(1) of this section has been issued subsequently.

§62-17-15. Discovery.

1 Discovery related to the forfeiture proceeding is subject to the Rules of Criminal
2 Procedure.

§62-17-16. Conviction required and standard of proof.

1 (a) Except as otherwise set forth in this article, property may be forfeited only if:

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

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

7 (b) Except as required by §62-17-7 of this code, nothing in this article prevents property
8 from being forfeited as part of:

9 (1) A plea agreement; or

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

§62-17-17. Exceptions to the requirement of conviction.

1 (a) The court may waive the conviction requirement in §62-17-16 of this code and hold
2 proceedings to grant permanent title of the property to the state if the prosecuting authority files a
3 motion no fewer than 90 days after seizure and shows by clear and convincing evidence that,
4 before conviction, the defendant:

5 (1) Died;

6 (2) Was deported by the U.S. government;

7 (3) Abandoned the property; or

8 (4) Fled the jurisdiction.

9 (b) Notwithstanding provisions of this section and §62-17-16 of this code, all property
10 remains subject to distribution to or claims by any person, other than the defendant, with an
11 interest in the property as provided in this article.

§62-17-18. Proportionality.

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

3 (b) The defendant has the burden of establishing the forfeiture is unconstitutionally
4 excessive by 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
6 consider all relevant factors including:

7 (1) The seriousness of the crime and its impact on the community, including the duration of
8 the 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 to be 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
14 deprive the 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
16 the property is forfeited.

17 (d) In determining the value of the instrumentality subject to forfeiture, the court may
18 consider all 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
20 the forfeiture is unconstitutionally excessive.

§62-17-19. Secured interest holder.

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

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

5 (c) If the property is not summarily returned, the secured interest holder may petition the
6 court at any time before the court enters judgment in the criminal prosecution or grants the motion
7 in §62-17-17 of this code.

8 (d) The court shall hear the petition within 30 days after its filing or at the court's discretion.
9 The hearing shall be held before the court alone, without a jury. The court may consolidate the
10 hearing on the 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
12 validity of the security interest, mortgage, lien, leasehold, lease, rental agreement or other
13 agreement.

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

16 (1) The interest is invalid; or

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

19 (g) If the state fails to meet its burden in subsection (f) the court shall order the state to
20 relinquish claims to the property, up to the value of the interest, and return the interest to the
21 secured interest holder.

§62-17-20. Innocent owners.

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

2 (b) The prosecuting authority or law-enforcement agency may summarily return property to
3 an innocent owner. Contraband shall not be returned.

4 (c) If the property is not summarily returned, an innocent owner claimant may petition the
5 court at any time before the court enters judgment in the criminal prosecution or grants the motion

6 in §62-17-17 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.

14 The hearing shall be held before the court alone without a jury. The court may consolidate the
15 hearing on the 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
17 in the property.

18 (h) If subsection (g) of this section is satisfied and the prosecuting authority seeks to
19 proceed, the prosecuting authority shall prove by clear and convincing evidence the claimant is not
20 an innocent owner 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
23 the crime 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
28 court 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
30 as evidence in the criminal prosecution 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
34 the marital privilege during the forfeiture proceeding. The trier of fact may draw an adverse
35 inference from the invocation of the right or privilege.

§62-17-21. Judgment.

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

4 (b) If the prosecuting authority meets its burden in the criminal and forfeiture proceeding,
5 the court shall enter judgment forfeiting the property.

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

§62-17-22. Substitution of assets.

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

6 (1) Dissipated the property;

7 (2) Transferred, sold, or deposited property with a third party to avoid forfeiture;

8 (3) Diminished substantially the value of property; or

9 (4) Commingled property with other property that cannot be divided without difficulty.

§62-17-23. No additional remedies.

1 The state may not seek personal money judgments or other remedies related to the
2 forfeiture of property not provided for in this article.

§62-17-24. No joint and several liability.

1 A defendant is not jointly and severally liable for forfeiture awards owed by other
2 defendants. When ownership is unclear, a court may order each defendant to forfeit property on a
3 pro-rata basis or by another means the court finds equitable.

§62-17-25. Appeals.

1 (a) A party to forfeiture proceeding, other than the defendant, may appeal the court's
2 decision.

3 (b) The defendant may appeal the court's decision regarding the seizure or forfeiture of
4 property following final judgment in the forfeiture proceeding.

§62-17-26. Attorney's fees.

1 In any proceeding in which a property owner prevails in a claim for return of property by
2 recovering at least half, by value, of the property or currency claimed, the seizing agency shall be
3 liable for:

4 (1) Reasonable attorney fees and other litigation costs incurred by the claimant;

5 (2) Post-judgment interest; and

6 (3) In cases involving currency, other negotiable instruments, or the proceeds of an
7 interlocutory sale, any interest actually paid from the date of seizure.

§62-17-27. Return of property; damages and costs.

1 (a) If the court orders the return of property, the law-enforcement agency that holds the
2 property shall return the property to the rightful owner within a reasonable period not to exceed five
3 days after the date of the order.

4 (b) The rightful owner shall 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,
7 storage fees, and related costs applicable to property returned under this section.

8 (d) Notwithstanding any provision of this article to the contrary, firearms may only be
9 returned to a person not prohibited under the provisions of §61-7-7 of this code or federal law,

10 including 18 U.S.C. §922(g) or (n), from receiving, possessing, or transporting a firearm.

§62-17-28. Disposition of property and proceeds.

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

3 (b) At any time when abandoned property or property seized from a defendant who flees
4 the 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 forfeited currency and sale proceeds to:

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

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

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

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

14 (e) After disbursements under subsection (d) of this section, the court may reimburse
15 actual costs by ordering the disbursements of:

16 (1) Up to 50% of remaining funds to reimburse the seizing law-enforcement agency for the
17 salaries, benefits, and overtime pay of uniformed personnel expended in the seizure of the
18 property and investigation of the underlying criminal offense; and

19 (2) Up to 50% of the remaining funds to reimburse the prosecuting authority and public
20 defender's office for the salaries, benefits, and overtime pay expended in the prosecution of the
21 underlying criminal offense and property litigation.

22 (f) After disbursements under subsection (e) of this section, the court may order the
23 disbursement of remaining funds to the state's general fund.

§62-17-29. 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 or law-enforcement officer.

NOTE: The purpose of this bill is to establish uniform procedures for civil asset forfeiture.

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