

H. B. 4407

(By Delegates Miley, Lawrence, Smith and Poore)
[By Request of the State Police]
[Introduced February 2, 2012; referred to the
Committee on the Judiciary then Finance.]

A BILL to amend and reenact §61-8C-1 and §61-8C-3 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto six new sections, designated §61-8C-6, §61-8C-7, §61-8C-8, §61-8C-9, §61-8C-10, §61-8C-11, and §61-8C-12 of the Code of West Virginia, 1931, as amended, all relating crimes and their punishment; filming of sexually explicit conduct of minors; Legislative findings; including "lascivious" and "child erotica" in definitions; establishing procedures for seizure, sale and forfeiture of assets and other real property used for the exploitation of children; and criminal penalties.

Be it enacted by the Legislature of West Virginia:

That §61-8C-1 and §61-8C-3 as amended, be amended and reenacted, and that said code be amended by adding thereto six new

1 sections designated §61-8C-6 §61-8C-7, §61-8C-8, §61-8C-9, §61-8C-
2 10, §61-8C-11 and §61-8C-12 of the Code of West Virginia, 1931, all
3 to read as follows:

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

5 **§61-8c-1. Definitions.**

6 For the purposes of this article:

7 (a) "Minor" means any child under eighteen years of age.

8 (b) "Knowledge" means knowing or having reasonable cause to
9 know which warrants further inspection or inquiry.

10 (c) "Sexually explicit conduct" includes any of the following,
11 whether actually performed or simulated:

12 (1) Genital to genital intercourse;

13 (2) Fellatio;

14 (3) Cunnilingus;

15 (4) Anal intercourse;

16 (5) Oral to anal intercourse;

17 (6) Bestiality;

18 (7) Masturbation;

19 (8) Sadomasochistic abuse, including, but not limited to,
20 flagellation, torture or bondage;

21 (9) Excretory functions in a sexual context; or

22 (10) Lascivious exhibition of the genitals, pubic or rectal
23 areas of any person.

24 (d) "Person" means an individual, partnership, firm,

1 association, corporation or other legal entity.

2 (e) "Child Erotica" means any material relating to minors
3 that serves a sexual purpose for a given individual, to include
4 nonnude or seminude photographs and videos of minors in sexually
5 suggestive poses modeling a variety of clothing types such as
6 dresses, bikinis, nightgowns or undergarments. Child erotica may
7 also include, in addition to images, other materials that may cause
8 sexual arousal, such as children's diaries, drawings, underwear,
9 letters and other similar items.

10 **§61-8C-3. Distribution and exhibiting of material depicting minors**
11 **engaged in sexually explicit conduct or child erotica**
12 **prohibited; penalty.**

13 Any person who, with knowledge, sends or causes to be sent, or
14 distributes, exhibits, possesses, displays or transports any
15 material visually portraying a minor engaged in any sexually
16 explicit conduct is guilty of a felony and, upon conviction
17 thereof, shall be imprisoned in a correctional facility, not more
18 than two years less than two years for each offense committed, and
19 fined not more than \$2,000.

20 Any person who, with knowledge, sends or causes to be sent,
21 or distributes, exhibits, possesses, displays or transports any
22 material visually portraying child erotica is guilty of a
23 misdemeanor, and, upon conviction thereof, shall be fined not more
24 than \$1,000 and confined in jail for not less than thirty days nor

1 more than twelve months, or both fined and confined.

2 **§61-8C-6. Legislative findings.**

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

12 **§61-8C-7. Items subject to forfeiture; persons authorized to seize**
13 **property subject to forfeiture.**

14 (a) The following are subject to forfeiture:

15 (1) All visual depictions which have been manufactured,
16 distributed, dispensed or possessed in violation of articles
17 three-c, eight-a, or eight-c of this chapter;

18 (2) All raw materials, products and equipment of any kind
19 which are used, or intended for use, in manufacturing, compounding,
20 processing, delivering, importing or exporting any visual
21 depictions or any crimes against children in violation of articles
22 three-c, eight-a, or eight-c of this chapter;

23 (3) All property which is used, or has been used, or is
24 intended for use, as a container for property described in

1 subdivision (1), (2) or (3) of this subsection;

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

7 (i) A conveyance used by any person as a common carrier in the
8 transaction of business as a common carrier may not be forfeited
9 under this section unless it appears that the person owning the
10 conveyance is a consenting party or privy to a violation of the
11 provisions of articles three-c, eight-a, or eight-c of this
12 chapter;

13 (ii) A conveyance may not be forfeited under the provisions of
14 this article if the person owning the conveyance establishes that
15 he or she neither knew, nor had reason to know, that the conveyance
16 was being employed or was likely to be employed in a violation of
17 the provisions of articles three-c, eight-a, or eight-c of this
18 chapter; and

19 (iii) A bona fide security interest or other valid lien in any
20 conveyance may not be forfeited under the provisions of this
21 article, unless the state proves by a preponderance of the evidence
22 that the holder of the security interest or lien either knew, or
23 had reason to know, that the conveyance was being used or was
24 likely to be used in a violation of the provisions of articles

1 three-c, eight-a, or eight-c of this chapter;

2 (5) All books, records, research products and materials,
3 including formulas, microfilm, tapes and data which are used, or
4 have been used, or are intended for use, in violation of the
5 provisions of articles three-c, eight-a, or eight-c of this
6 chapter;

7 (6) All moneys, negotiable instruments, securities or other
8 things of value furnished or intended to be furnished in violation
9 of this chapter by any person in exchange for a visual depiction,
10 all proceeds traceable to the exchange and all moneys, negotiable
11 instruments and securities used, or which have been used, or which
12 are intended to be used to facilitate any violation of the
13 provisions of articles three-c, eight-a, or eight-c of this
14 chapter: *Provided*, That property may not be forfeited under this
15 subdivision, to the extent of the interest of an owner, by reason
16 of any act or omission established by that owner to have been
17 committed or omitted without his or her knowledge or consent; and

18 (7) All real property, including any right, title and interest
19 in any lot or tract of land, and any appurtenances or improvements,
20 which are used, or have been used, or are intended to be used, in
21 any manner or part, to commit or to facilitate the commission of a
22 violation of the provisions of articles three-c, eight-a, or eight-
23 c articles of this chapter punishable by more than one year
24 imprisonment: *Provided*, That property may not be forfeited under

1 this subdivision, to the extent of an interest of an owner, by
2 reason of any act or omission established by that owner to have
3 been committed or omitted without his or her knowledge or consent.

4 (a) The requirements of this subsection pertaining to the
5 removal of seized property are not mandatory in the case of real
6 property and the appurtenances to the real property.

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

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

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

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2 **§61-8C-8. Procedures for seizure of forfeitable property.**

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

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

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

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

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

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

20 (c) If there is a seizure pursuant to subsection (b) of this
21 section, forfeiture proceedings shall be instituted within ninety
22 days of the seizure thereof.

23 (d) Property taken or detained under this section may not be
24 subject to replevin, but is considered to be in the custody of the

1 appropriate person, subject only to the orders and decrees of the
2 court having jurisdiction over the forfeiture proceedings. When
3 property is seized under this article, the appropriate person may:

4 (1) Place the property under seal;

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

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

9 (4) In the case of seized moneys, securities or other
10 negotiable instruments, place the assets in any interest-bearing
11 depository insured by an agency of the federal government. The
12 requirements of this subsection pertaining to the removal of seized
13 property are not mandatory in the case of real property and
14 appurtenances to the real property.

15 **§61-8C-9. Procedures for forfeiture.**

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

22 (2) A petition for forfeiture may be filed and proceedings
23 held thereon in the circuit court of the county wherein the seizure
24 was made, the real property subject to forfeiture is situate or the

1 circuit court of the county wherein any owner of the property
2 subject to forfeiture may reside.

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

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

12 (i) A description of the property seized;

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

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

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

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

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

22 (vii) The identity of all persons or corporations having a
23 perfected security interest or lien in the subject property, as
24 well as the identity of all persons or corporations known to the

1 affiant who may be holding a possessory or statutory lien against
2 the property;

3 (viii) A prayer for an order directing forfeiture of the
4 seized property to the state and vesting ownership of the property
5 in the state.

6 (b) At the time of filing or as soon as practicable
7 thereafter, a copy of the petition for forfeiture shall be served
8 upon the owner or owners of the seized property, as well as all
9 holders of a perfected security interest or lien or of a possessory
10 or statutory lien in the same class, if known. Should diligent
11 efforts fail to disclose the lawful owner or owners of the seized
12 property, a copy of the petition for forfeiture shall be served
13 upon any person who was in possession or alleged to be in
14 possession of the property at the time of seizure, where that
15 person's identity is known. The service shall be made pursuant to
16 the provisions of the West Virginia Rules of Civil Procedure. Any
17 copy of the petition for forfeiture so served shall include a
18 notice substantially as follows:

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

1 If no owner or possessors, lien holders or holders of a
2 security interest are found, then the service may be by Class II
3 legal publication in accordance with the provisions of article
4 three, chapter fifty-nine of this code and the publication area
5 shall be the county wherein the property was located at the time of
6 seizure and the county wherein the petition for forfeiture is
7 filed.

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

24 (1) A description of the property seized;

1 (2) A statement as to who is responsible for the seizure;

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

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

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

7 (6) A statement that prayer for an order directing forfeiture
8 of the seized property to the state and vesting ownership of the
9 property in the state shall be requested of the court.

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

19 (e) At the hearing upon the claim or claims, the state has the
20 burden of proving by a preponderance of the evidence that the
21 seized property is subject to forfeiture pursuant to the provisions
22 of this chapter.

23 (f) Any order forfeiting property to the state and entered
24 pursuant to this section perfects the state's right, title and

1 interest in the forfeited property and relates back to the date of
2 seizure: *Provided*, That the circuit court shall make specific
3 findings in its final order with respect to whether probable cause
4 to seize the property existed at the time of the seizure in any
5 proceeding under this article.

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

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

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

1 final appealable order. The appellant shall give notice of intent
2 to appeal within thirty days of the entry of the appealable order.

3 **§61-8C-10. Disposition of forfeited moneys, securities or other**
4 **negotiable instruments; distribution of proceeds.**

5 (a) When moneys, securities or other negotiable instruments
6 are forfeited under the provisions of this article, the proceeds
7 shall be distributed as follows:

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

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

16 (b) Funds may not be expended from the special Law-enforcement
17 Investigation Fund except as follows:

18 (1) The funds shall only be expended at the direction of the
19 Superintendent of the State Police and in accordance with the
20 provisions of section fifteen, article two, chapter five-a of this
21 code and the provisions of subsection (j), section two, article
22 two, chapter twelve of this code;

23 (2) If funds belong to the office of the prosecuting attorney
24 of any county in which the special fund has been created, the funds

1 therein may only be expended in the manner provided in sections
2 four and five, article five, chapter seven of this code; and
3 **§61-8C-11. Disposition of other forfeited property; distribution of**
4 **proceeds.**

5 (a) When property other than that referred to in section seven
6 of this article is forfeited under this article, the circuit court
7 ordering the forfeiture, upon application by the prosecuting
8 attorney or the Superintendent of the State Police or his designee,
9 may direct that:

10 (1) Title to the forfeited property be vested in the Law-
11 enforcement Agency so petitioning; or

12 (2) The Law-enforcement Agency responsible for the seizure
13 retain the property for official use; or

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

19 (b) When a Law-enforcement Agency receives property pursuant
20 to this section, the court may, upon request of the prosecuting
21 attorney initiating the forfeiture proceeding, require the Law-
22 enforcement Agency to pay unto the office of the prosecuting
23 attorney a sum not to exceed ten percent of the value of the
24 property received to compensate that office for actual costs and

1 expenses incurred.

2 (c) The proceeds of every public sale conducted pursuant to
3 this section shall be paid and applied as follows: (1) The balance
4 due on any security interest preserved by the court; (2) to the
5 costs incurred in the storage, maintenance and security of the
6 property and; (3) to the costs incurred in selling the property.

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

10 (1) Ten percent of the proceeds shall be tendered to the
11 office of the prosecuting attorney who initiated the forfeiture
12 proceeding.

13 (2) The balance shall be deposited in a special Law-
14 enforcement Investigation fund. This fund shall be administered by
15 the Superintendent of the State Police or his designee and shall
16 take the form of an interest-bearing account with any interest
17 earned to be compounded to the fund. Any funds deposited in the
18 special Law-enforcement Investigative Fund pursuant to this article
19 shall be expended only to defray the costs of protracted or complex
20 investigations, to provide additional technical equipment or
21 expertise, to provide matching funds to obtain federal grants or
22 for such other law-enforcement purposes as the Superintendent of
23 the State Police or, designee, may determine appropriate:
24 Provided, That these funds may not be utilized for regular

1 operating needs.

2 (e) If more than one Law-enforcement Agency was substantially
3 involved in effecting the seizure and forfeiture of property, the
4 court wherein the petition for forfeiture was filed shall equitably
5 distribute the forfeited property among the law-enforcement
6 agencies. If there is a public sale of the property pursuant to
7 subsection (a) of this section, the court shall equitably
8 distribute any proceeds remaining after distribution pursuant to
9 subsection (c) and subdivision (1), subsection (d) of this section
10 among such law-enforcement agencies for deposit into their
11 individual special Law-enforcement Investigative Fund. Equitable
12 distribution shall be based upon the overall contribution of the
13 individual Law-enforcement Agency to the investigation which led to
14 the seizure.

15 (f) The state shall issue a title or registration certificate
16 to any bona fide purchaser at a public sale of the property
17 conducted pursuant to subsection (a) of this section for which
18 title or registration is required by law. The state shall issue a
19 title or registration certificate to the appropriate governmental
20 body, upon the request of the Law-enforcement Agency receiving or
21 electing to retain any forfeited property for which title or
22 registration is required by law, pursuant to subsection (a) of this
23 section.

24 (g) Any funds expended pursuant to the provisions of this

1 section, shall only be expended in the manner provided in
2 subsection (b), section ten of this article.

3 (h) Every prosecuting attorney or Law-enforcement Agency
4 receiving forfeited property or proceeds from the sale of forfeited
5 property pursuant to this article shall submit an annual report to
6 the body which has budgetary authority over the agency. The report
7 shall specify the type and approximate value of all forfeited
8 property and the amount of proceeds from the sale of forfeited
9 property received in the preceding year. A county or municipality
10 may not use anticipated receipts of forfeited property in their
11 budgetary process.

12 (i) In lieu of the sale of any forfeited property subject to
13 a bona fide security interest preserved by an order of the court,
14 the Law-enforcement Agency receiving the forfeited property may pay
15 the balance due on any security interest preserved by the court
16 from funds budgeted to the office or department or from the special
17 fund and retain possession of the forfeited property for official
18 use pursuant to subsection (a) of this section.

19 (j) In every case where property is forfeited, disposition of
20 the forfeited property, in accordance with this article, shall be
21 made within six months of the date upon which the court of
22 jurisdiction orders forfeiture. Should the office or agency
23 receiving the property fail either to place the property in
24 official use or dispose of the property in accordance with law, the

1 court of jurisdiction shall cause disposition of the property to be
2 made with any proceeds there from to be awarded to the state.

3 (k) A disposition may not occur until all applicable periods
4 for filing a notice of intent to appeal has expired and a party in
5 interest has not filed a notice. The filing of the notice of
6 intent to appeal shall stay any such disposition until the appeal
7 has been finally adjudicated or until the appeal period of one
8 hundred eighty days has expired without an appeal having actually
9 been taken or filed, unless a valid extension of the appeal has
10 been granted by the circuit court under the provisions of section
11 seven, article four, chapter fifty-eight of this code.

12 (l) The special Law-enforcement Investigative Funds of each
13 Law-enforcement Agency may be placed in an interest-bearing
14 depository insured by the federal government.

NOTE: The purpose of this bill is to add language to the code to provide for the seizure of assets and other real property used for the exploitation of children and mirrors current code related to the forfeiture of assets and real property in drug trafficking investigations. It adds the term "lascivious" and to the sexually explicit conduct definitions under §61-8C-1 to more closely resemble the Federal Statute by adding the word lascivious and to allow prosecution for child erotica images that serve a sexual purpose (See United States v Knox (1994)). A new definition of "Child Erotica" is also added. The criminal penalty is enhanced and a section was added to §61-8C-3 providing for a misdemeanor offense relating to child erotica material.

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

§61-8C-6, §61-8C-7, §61-8C-8, §61-8C-9, §61-8C-10, §61-8C-11, and §61-8C-12 are new; therefore, it has been completely underscored.