WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1988

ENROLLED

Committee Substitute For
SENATE BILL NO. 157

(By Senator Palumbo, et al.)

PASSED MARCH 11, 1988
In Effect 90 DAYS FROM Passage
ENROLLED
COMMITTEE SUBSTITUTE
FOR
Senate Bill No. 151
(SENATORS PALUMBO, PARKER AND JACKSON, original sponsors)

[Passed March 11, 1988; in effect ninety days from passage.]

AN ACT to repeal section five hundred five, article five, chapter sixty-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend said chapter sixty-a by adding thereto a new article, designated article seven, relating to forfeiture proceedings in illegal drug offenses; setting forth short title; legislative findings; enumerating items subject to forfeiture; exceptions; authorizing certain persons to seize property; disposition of contraband and other items seized; setting forth procedure for seizure of forfeitable property; when process issued by court necessary for seizure; setting forth when property may be seized without process; disposition of such property; establishing civil proceeding for forfeiture; setting forth the time, contents of and procedure for filing a petition for forfeiture; when court may order the forfeiture of property; prohibiting transfer of property during pendency of proceeding; setting forth time for appeal and notice thereof; providing for the disposition of forfeited moneys, securities and other negotiable instruments; distribution of proceeds; providing for the disposition of other forfeited property; and setting forth the time and manner of disposition of proceeds thereof.

*2nd Printing*
Be it enacted by the Legislature of West Virginia:

That section five hundred five, article five, chapter sixty-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; and that said chapter sixty-a be amended by adding thereto a new article, designated article seven, all to read as follows:

ARTICLE 7. WEST VIRGINIA CONTRABAND FORFEITURE ACT.

§60A-7-701. Short title.

This article shall be known and cited as the "West Virginia Contraband Forfeiture Act."

§60A-7-702. Legislative findings.

The Legislature hereby finds and declares that the seizure and sale of items under the provisions of this article is not contemplated to be a forfeiture as the same is used in article twelve, section five of the West Virginia constitution and to the extent that such seizure and sale may be found to be such a forfeiture, the Legislature hereby finds and declares that the proceeds from a seizure and sale under this article is not part of net proceeds as the same is contemplated by such article twelve, section five of the West Virginia constitution.

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

(a) The following are subject to forfeiture:

(1) All controlled substances which have been manufactured, distributed, dispensed or possessed in violation of this chapter;

(2) All raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing or exporting any controlled substance in violation of this chapter;

(3) All property which is used, or has been used, or is intended for use, as a container for property described in subdivision (1) or (2);

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

(i) No conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under this section unless it appears that the person owning such conveyance is a consenting party or privy to a violation of this chapter;

(ii) No conveyance shall be forfeited under the provisions of this act if the person owning such conveyance establishes that he neither knew, nor had reason to know, that such conveyance was being employed or was likely to be employed in a violation of this chapter; and

(iii) No bona fide security interest or other valid lien in any conveyance shall be forfeited under the provisions of this article, unless the state proves by a preponderance of the evidence that the holder of such security interest or lien either knew, or had reason to know, that such conveyance was being used or was likely to be used in a violation of this chapter.

(5) All books, records, research products and materials, including formulas, microfilm, tapes and data which are used, or have been used, or are intended for use, in violation of this chapter;

(6) All moneys, negotiable instruments, securities or other things of value furnished or intended to be furnished in violation of this chapter by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments and securities used, or which have been used, or which are intended to be used to facilitate any violation of this chapter: Provided, That no property may be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without his knowledge or consent;

(7) All real property, including any right, title and interest in any lot or tract of land, and any appurtenances or improvements, which are used, or have been used, or are intended to be used, in any manner or part, to commit, or to facilitate the commission of a violation of this chapter punishable by more than one year imprisonment: Provided, That no property may be forfeited under this paragraph, to
the extent of an interest of an owner, by reason of any act or
omission established by that owner to have been committed
or omitted without his knowledge or consent.

The requirements of this subsection pertaining to the
removal of seized property are not mandatory in the case of
real property and the appurtenances thereto.

(b) Property subject to forfeiture under this article may
be seized by any person granted enforcement powers in
section five hundred one, article five of this chapter
(hereinafter referred to as the "appropriate person" in this
article).

(c) Controlled substances listed in article two of this
chapter which are manufactured, possessed, transferred,
sold or offered for sale in violation of this chapter are
contraband and shall be seized and summarily forfeited to
the state. Controlled substances which are seized or come
into the possession of the state, the owners of which are
unknown, are contraband and shall be summarily forfeited
to the state upon the seizure thereof.

(d) Species of plants from which controlled substances
may be derived which have been planted or cultivated in
violation of the provisions of this chapter, or of which the
owners or cultivators are unknown, or which are wild
growths, may be seized and summarily forfeited to the state
upon the seizure thereof.

(e) The failure, upon demand by the appropriate person,
or his authorized agent, of the person in occupancy or in
control of land or premises upon which the species of plants
are growing or being stored, to produce an appropriate
registration, or proof that he is the holder thereof,
constitutes authority for the seizure and forfeiture of the
plants.

(f) Notwithstanding any provision of this article to the
contrary, controlled substances listed in article two of this
chapter and species of plants from which controlled
substances may be derived shall either be destroyed or used
only for investigative or prosecutorial purposes.

(g) Notwithstanding any other provisions of this article
to the contrary, any items of real property or any items of
tangible personal property sold to a bona fide purchaser
will not be subject to forfeiture unless the state establishes
by clear and convincing proof that such bona fide purchaser
knew or should have known that such property had in the
previous three years next preceding such sale been used in
violation of this chapter or that such property is a
controlled substance.

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

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

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

1. The seizure is incident to a lawful arrest or pursuant
to a search under a search warrant or an inspection
warrant;

2. The property subject to seizure has been the subject
of a prior judgment in favor of the state in a forfeiture
proceeding based upon this article;

3. The appropriate person has probable cause to
believe that the property is directly or indirectly dangerous
to health or safety; or

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

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

(d) Property taken or detained under this section shall
not be subject to replevin, but is deemed to be in the custody
of the appropriate person, subject only to the orders and
decrees of the court having jurisdiction over the forfeiture
proceedings. When property is seized under this article, the
appropriate person may:

1. Place the property under seal;

2. Remove the property to a place designated by him; or

3. Require the appropriate law-enforcement agency to
take custody of the property and remove it to an
appropriate location for disposition in accordance with
law.

The requirements of this subsection pertaining to the
removal of seized property are not mandatory in the case of
real property and appurtenances thereto.
§60A-7-705. Procedures for forfeiture.

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

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

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

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

5 (i) A description of the property seized;

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

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

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

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

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

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

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

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

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

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

(c) In addition to the requirements of subsections (b) above, the prosecuting attorney or law-enforcement officer upon whose oath or affirmation the petition for forfeiture is based, shall be responsible for the publication of a further notice. Such further notice that a petition for forfeiture has been filed shall be published by Class II legal advertisement in accordance with article three, chapter fifty-nine of this code. The publication area shall be the county wherein the property was seized and the county wherein the petition for forfeiture is filed. The notice shall advise any claimant to the property of their right to file a claim on or before the date set forth in the notice, which date shall not be less than thirty days from the date of the first publication. The notice shall specify that any claim must clearly state the identity of the claimant and an address where legal process can be served upon that person. In addition such notice shall contain the following information:
(1) A description of the property seized;
(2) A statement as to who is responsible for the seizure;
(3) A statement of the time and place of seizure;
(4) The identity of the owner or owners of the property, if known;
(5) The identity of the person or persons in possession of the property at the time of seizure, if known.
(6) A statement that prayer for an order directing forfeiture of the seized property to the state, and vesting ownership of such property in the state shall be requested of the court.

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

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

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

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

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

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

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

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

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

(2) The balance shall be deposited in a special law-enforcement investigation fund. Such fund shall be administered by the chief of the law-enforcement agency that seized the forfeited property.

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

(1) In the case of the funds belonging to the department of public safety, such funds shall only be expended at the direction of the superintendent of such department and in accordance with the provisions of section fifteen, article two, chapter five-a of this code and the provisions of subsection (j), section two, article two, chapter twelve of said code;

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

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

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

(a) When property other than that referred to in section seven hundred six of this article is forfeited under this article, the circuit court ordering such forfeiture, upon application by the prosecuting attorney or the chief of the law-enforcement agency that seized said forfeited property, may direct that:

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

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

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

(b) When a law-enforcement agency receives property pursuant to this section, the court may, upon request of the prosecuting attorney initiating the forfeiture proceeding, require the law-enforcement agency to pay unto the office of said prosecuting attorney, a sum not to exceed ten percent of the value of the property received to compensate said office for actual costs and expenses incurred.

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

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

(1) Ten percent of such proceeds shall be tendered to the office of the prosecuting attorney who initiated the forfeiture proceeding.
(2) The balance shall be deposited in a special law-enforcement investigation fund. Such fund shall be administered by the chief of the law-enforcement agency that seized the forfeited property sold and shall take the form of an interest bearing account with any interest earned to be compounded to the fund. Any funds deposited in the special law-enforcement investigative fund pursuant to this article shall be expended only to defray the costs of protracted or complex investigations, to provide additional technical equipment or expertise, to provide matching funds to obtain federal grants or for such other law-enforcement purposes as the chief of the law-enforcement agency may deem appropriate; however, these funds may not be utilized for regular operating needs.

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

(f) Upon the sale of any forfeited property for which title or registration is required by law, the state shall issue a title or registration certificate to any bona fide purchaser at a public sale of such property conducted pursuant to subsection (a) of this section. Upon the request of the law-enforcement agency receiving, pursuant to the order of the court, or electing to retain, pursuant to subsection (a) of this section, any forfeited property for which title or registration is required by law, the state shall issue a title or registration certificate to the appropriate governmental body.

(g) Any funds expended pursuant to the provisions of this section, shall only be expended in the manner provided in subsection (b), section seven hundred five of this article.
(h) Every prosecuting attorney or law-enforcement agency receiving forfeited property or proceeds from the sale of forfeited property pursuant to this article shall submit an annual report to the body which has budgetary authority over such agency. Such report shall specify the type and approximate value of all forfeited property and the amount of proceeds from the sale of forfeited property received in the preceding year. No county or municipality may use anticipated receipts of forfeited property in their budgetary process.

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

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

(k) No such disposition shall occur until all applicable periods for filing a notice of intent to appeal has expired and no party in interest shall have filed such notice. The filing of such notice of intent to appeal shall stay any such disposition until the appeal has been finally adjudicated or until the appeal period of one hundred eighty days has expired without an appeal having actually been taken or filed, unless a valid extension of such appeal has been granted by the circuit court under the provisions of section seven, article four, chapter fifty-eight of this code.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within .....................this the .....................
day of ....................., 1988.

Governor