MARYLAND OFFICE OF THE PUBLIC DEFENDER

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POSITION ON PROPOSED LEGISLATION

BILL: House Bill 948 – Organized Retail Theft – Venue for Prosecution, Warrantless Arrest Authority, and Court Finding

FROM: Maryland Office of the Public Defender

POSITION: Unfavorable

DATE: February 16, 2024

The Maryland Office of the Public Defender urges an unfavorable report on House Bill 948.

This bill aims to permit the prosecution for the aggregate of MULTIPLE THEFTS COMMITTED BY THE SAME PERSON IN MULTIPLE COUNTIES UNDER ONE SCHEME OR CONTINUING COURSE OF CONDUCT MAY BE AGGREGATED AND PROSECUTED IN ANY COUNTY IN WHICH ANY ONE OF THE THEFTS OCCURRED.

MOPD's first concern is that the "One scheme" is overbroad and vague. According to Maryland criminal law, "if the acts alleged are of the same nature and so connected that they can be construed as stages in one criminal transaction, they may be joined in one count, although separately considered they are separate offenses." *Ayer v. State*. The language of the law does not define what one scheme is. It is unclear if the thefts have to be similar (meaning similar items or similar stores or the same store?)

In Maryland, a penal statute is considered impermissibly vague when it fails to explicitly inform those who are subject to it what conduct on their part will render them liable to its penalties. *Galloway v. State*, 130 Md. App. 89. In general, the vagueness doctrine balances the

need for criminal statutes general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. *Todd v. State*, 161 Md. App. 332. A statute is unconstitutionally overbroad if it includes within its prohibitions what may not be punished under the First and Fourteenth Amendments - it criminalizes constitutionally protected speech and/or expressive conduct. *McCree v. State*, 214 Md. App. 238.

To survive strict judicial scrutiny, a law must be necessary to serve a compelling state interest and narrowly drawn to achieve that end. *State v. Sheldon*, 332 Md. 45. Under strict scrutiny, a statute may be validated only if it is deemed to be suitably, or narrowly, tailored to further a compelling state interest. *Koshko v. Haining*, 398 Md. 404. A statute is not "narrowly tailored" if a **less restrictive alternative** would serve the Government's purpose. This requirement ensures that speech is restricted no further than necessary to achieve the intended goal, for it is important to ensure that legitimate speech is not chilled or punished. *See Nefedro v. Montgomery County*, 414 Md. 585 (finding that a Montgomery County, Maryland ordinance prohibiting the acceptance of payment for fortune telling services was unconstitutional as the Court identified at least one less restrictive, effective means of combating fraud).

Turning to the issue of overbreadth, in *Ayre v. State*, the Maryland Court of Special Appeals overturned a conviction under Md. Ann. Code art. 27, § 418, finding the statute was overly broad because it **charged multiple offenses** in one count. *See Ayre v. State*, 21 Md. App. 61 (holding that § 418 created separate offenses, and therefore charging them all together in one count made the statute defective). In a subsequent case, the Court held that a statute simplified the common law by consolidating the three types of escape into one statute and making all escape a felony. *See Robinson v. State*, 353 Md. 683, 699 (explaining that the common law crime

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of larceny was abrogated by the enactment of the consolidated theft statute, which merged all the formerly distinct larceny-like common law offenses, as well as the offense of receiving stolen property, into a single crime of theft).

The prohibition of **duplicity** is said to implicate a defendant's rights to notice of the charge against him, to a unanimous verdict, to appropriate sentencing and to protection against double jeopardy. *See State v. Cooksey*, 128 Md. App. 331, 335. The goal is to avoid violations of proportionality by aggregating various petty, non-violent offenses to artificially create a new felony.

In *Kelley*, multiple items of property were taken from three different owners, over differing periods of time, from three separate locations a mile or more apart from one another. *See Kelley v. State*, 402 Md. 745, 747 (defining 'continuing course of conduct' as "quick or unbroken succession of those acts from another so as to indicate a single scheme or continuing impulse or course of conduct that would require the three separate incidents to be considered as one theft for the purposes of sentencing)." The petitioner asserted the State could not aggregate the value of the property taken with respect to the three individual counts, so as to make the separate takings one felony theft in each case, but then consider the thefts separate for sentencing purposes. The court found that the case did not involve takings from the three owners occurring in quick and unbroken succession as the thefts occurred during different time periods, at least two of which did not even overlap. The court found that there was no evidence that any of the takings from one owner occurred in quick or unbroken succession of those from another, and therefore the theft did not constitute a continuing course of conduct. All 3 of these thefts occurred within a 90 day period, and the court still said they are not related enough to constitute a continuing course of conduct, thus it seems ill advised to include in "within a 90 day period."

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With that in mind, it seems that the 90 day period suggested by House Bill 948 is not sufficient to constitute continuing a course of conduct.[1]

Moreover, the 7-103(f)(2): language of "any" county invites jurisdictional issues. It does not clarify what procedure may exist, if any, when two counties who have an equal claim to bring a case want to bring the case. It does not address if one of the thefts necessary to aggregate the value of the property to raise the offense to a felony occurs in a county in a different state.

We are also concerned with issues of **misjoinder:** Due process prevents the State from going forward with two trials at the same time before a single jury. *Epps v. State,* 52 Md.App. 308, 317 (1982) holds that: "[A] defendant charged with similar but unrelated offenses is entitled to a severance where he establishes that the evidence as to each individual offense would not be mutually admissible at separate trials." *See also McKinney v. State*, 82 Md.App 111 (1990) (discussing whether evidence of one crime would otherwise be admissible in the trial of the second crime). House Bill 948 appears to overlook the potential of prejudice in joinder as noted in Maryland 4-253. *State v. Kramer* indicates that: "Potential prejudice is the overbearing concern of the law of this State with respect to the question of joint or separate trials of a defendant charged with criminal trials." 318 Md. 576, 583 (1990)

Additionally, this would create evidentiary issues in light of the prohibition on character evidence and could lead to unconstitutional presentation of evidence of other crimes.

House Bill 948 seems to be a reaction to overpublicized incidents of non-violent offenses spotlighted by certain segments of the media. The behavior in this is already adequately addressed by existing statutes. For example, Theft Scheme is already on the books to address the

[1] Note that Theft Scheme has been evaluated by the Court of Appeals, explaining that "separate thefts involved same subject matter, same **modus operandi**, same perpetrator, **same geographic area,** and **they occurred within a week of each other**, and thus, evidence of one scheme or continuing course of conduct was compelling. [Underlining and bolding added.] Painter v. State, 2004, 157 Md.App. 1.

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proscribed behavior. House Bill 948 may be subject to prosecutorial overreach in an attempt to elevate non-violent offenses to felony prosecutions, it would allow for the prosecution of as few a single person who steals in non-violent events as little twice. It is unnecessary to speculate that this proposed law would be a weapon misused by overzealous prosecutors.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue an unfavorable report on House Bill 1057

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