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March 22, 2024

The Honorable Ron Watson
Maryland Senate
121 James Senate Office Building
Annapolis, Maryland 21401
Via email

Re: Senate Bill 100 – Criminal Law - Organized Retail Theft

Dear Senator Watson:

You have inquired whether the joinder provisions of Senate Bill 100 (Criminal Law – Organized Theft) present a due process or other constitutional violation. Specifically, you are inquiring about the validity of an allegation that "the bill may result in charging numerous co-defendants, including those that may have no connection to one another or to the jurisdiction[,]" which allegedly "poses due process and constitutional concerns by admitting evidence that would not be mutually admissible if the trial were separated and is unduly prejudicial to one or more defendants."

The joinder provision in SB 100 is discretionary and does not change existing common law or Maryland Rule with respect to the joinder of offenses and the need for the State to demonstrate the mutual admissibility of evidence required to join charges proposed § 7-103(f)(2) of the Criminal Law Article ("CR"). The bill clarifies that there *may* be joinder of charges related to multiple thefts committed by the same person in multiple counties under one scheme or continuing course of conduct. Joinder under the bill remains subject to existing judicial authority to determine that the evidence of the multiple thefts in that instance is mutually admissible in order to join the charges. The bill does not seek to remove the existing discretion of a court in the joinder or

severance of offenses. There is no suggestion in the bill that joinder is mandatory or that it may be authorized in the absence of the mutual admissibility of evidence, as required by common law and under the Maryland Rules. The bill also authorizes the prosecution of a joined trial in any county in which any of the thefts occurred. The General Assembly has undisputed authority to determine venue for any criminal prosecution in the State.

Under Maryland Rule 4-253(b), "upon motion of a party, a trial court may join separate but related offenses in a trial of a single defendant where the defendant 'has been charged in two or more charging documents.' This Rule is based on a policy favoring judicial economy and its purpose is 'to save the time and expense of separate trials under the circumstances named in the Rule, if the trial court, in the exercise of its sound discretion deems a joint trial meet and proper.'" *State v. Hines*, 450 Md. 352, 368 (2016). Under Rule 4-253(c), "[i]f it appears that any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, the court may, on its own initiative or on motion of any party, order separate trials of counts, charging documents, or defendants, or grant any other relief as justice requires." Maryland courts have repeatedly held that "prejudice" within the context of joinder under Rule 4-253, is "a 'term of art' and refers only to prejudice resulting to the defendant from the reception of evidence that would have been inadmissible against that defendant had there been no joinder." *Galloway v. State*, 371 Md. 379, 394 n.11 (2002).

In exercising discretion to avoid prejudice to a defendant in the joinder context, a court must engage in the following analysis: "First, the judge must determine whether evidence that is non-mutually admissible as to multiple offenses of defendants will be introduced. Second, the trial judge must determine whether the admission of such evidence will cause unfair prejudice to the defendant who is requesting a severance. Finally, the judge must use [their] discretion to determine how to respond to any unfair prejudice caused by the admission of non-mutually admissible evidence. *Hines*, 450 Md. at 369. *See also McKnight v. State*, 280 Md. 604, 612 (1977) (in a jury trial, "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").

As the Maryland Supreme Court explained, the "question of mutual admissibility is simply a method of assessing what difference there would be between a joint and separate trial in a given case. *See McKnight*, 280 Md. at 610 ("Where evidence of one crime would be admissible at a separate trial on anther charge, a defendant will not suffer any additional prejudice if the two charges are tried together") [and] *Solomon* [*v. State*, 101 Md. App 331, 343 (1994)] ("[P]rejudice at a joint trial does not consist of damage from evidence that would have been admissible in any event even had the trials of the defendants or charges been severed")." *Hines*, 450 Md. at 373.

In the context of joinder of multiple thefts by the same person in multiple counties under one scheme or continuing course of conduct, as long as the State can establish the mutual

admissibility[1] of the evidence of the multiple thefts under a single scheme or a continuing course of conduct, a court may join charges or offenses in a single trial under Rule 4-253, and proposed CR § 7-103(f)(2) is consistent with that existing authority.

As to establishing the venue for a prosecution under the bill, the General Assembly is free to statutorily establish the venue for a trial in this context, particularly if one of the joined offenses occurred in that county. As the Maryland Appellate Court explained in *Smith v. State*, 116 Md. App. 43, 62 (1997): "The common law venue for any crime is the county where the crime is committed, the *locus criminis*. *McBurney v. State,* 280 Md. 21, 31 (1977); *Kisner v. State*, 209 Md. 524, 529 (1956). *See 1 Wharton's Criminal Procedure* (13th ed. 1989 & 1996 Supp.) § 34. In Maryland, the common law of venue controls unless modified by statute. *See Kisner*, 209 Md. at 529-36." Unlike *jurisdiction* of a court, "Maryland does not consider *venue* to be a fundamental right or requirement," and "venue requirements may be altered by the legislature and may be waived." *Smith*, 116 Md. App. at 57 (emphasis added).

For the foregoing reasons, I see no due process or constitutional concerns with respect to the joinder or venue provisions of SB 100. The joinder authority under proposed CR § 7-103(f)(2) is discretionary and is consistent with existing common law and Maryland Rule 4-253(b) with respect to the joinder of offenses and the need for the State to demonstrate the mutual admissibility of evidence required to join charges under the bill. Additionally, the General Assembly has the authority to statutorily specify in SB 100 that the venue for a joined prosecution for multiple thefts

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[1] "The analysis of mutual admissibility is made by answering a hypothetical question: Would evidence of each charge be admissible in a separate trial of each other charge?" *Conyers v. State*, 345 Md. 525, 549 (1997). Whether evidence of one offense would be admissible in a trial on another offense concerns, by definition, "other crimes" evidence. *Id*. (citing *Solomon*, 101 Md. App. at 341-42.) "Other crimes" evidence is "evidence that relates to an offense separate from that for which the defendant is presently on trial." *State v. Faulkner*, 314 Md. 630, 634 (1989). As the Maryland Supreme Court stated in *Ross v. State*, 276 Md. 664, 669 (1976):

> The frequently enunciated general rule in this state ... is that in a prosecution for a particular crime, evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same type, is irrelevant and inadmissible. This principle is merely an application of the policy rule prohibiting the initial introduction by the prosecution of evidence of bad character. Thus, the state may not present evidence of other criminal acts of the accused unless the evidence is "substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character."

(Citations omitted). Some of the "other purposes" for which "other crimes" evidence may be admitted were discussed in *Soloman*, 101 Md. App. at 353-55, including factors of substantial relevance such as: motive; identity; evidence of a common scheme or plan; when several offenses are so connected in point of time or circumstances that one cannot be fully shown without proving the other; or when other like crimes by the accused are so nearly identical in method as to earmark them as the handiwork of the accused.

by the same person in multiple counties under one scheme or continuing course of conduct may be any county in which any of the thefts occurred.

I hope this is responsive to your request. If you have any questions or need any additional information, please feel free to contact me.

Sincerely,

Jeremy M. McCoy
Assistant Attorney General