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OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

TO: **Senate Committee on Judiciary**
FROM: **Mae Lee Browning, Oregon Criminal Defense Lawyers Association**
DATE: **March 10, 2023**
RE: **OPPOSITION TO SB 340**

Chair Prozanski, Vice Chair Thatcher, and members of the Senate Committee on Judiciary:

My name is Mae Lee Browning. I represent the Oregon Criminal Defense Lawyers Association. OCDLA's 1,200 members statewide include public defense providers, private bar attorneys, investigators, experts, and law students. Our attorneys represent Oregon's children and parents in juvenile dependency proceedings, youth in juvenile delinquency proceedings, adults in criminal proceedings at the trial and appellate level, as well as civil commitment proceedings throughout the state of Oregon. Our mission is championing justice, promoting individual rights, and supporting the legal defense community through education and advocacy.

OCDLA STRONGLY OPPOSES SB 340. This bill:

- **Is unnecessary.** Between the repeat property offender statute (ORS 137.717) and BM57, there are already huge sentences being handed out for property offenses. The state can already aggregate multiple transactions against the same victim for a 180 day period.
- **Will subject more people to potential prison sentences.**
- **Will cost the state more money for public defense.** Defense attorneys would need to travel to multiple counties to conduct basic investigation of Theft in the Second Degree charges, which will be very costly from a time and travel perspective.
- **Will result in more people charged with crimes being held in jail with no public defender to represent them.** This bill will make some misdemeanors felonies, which would require a felony-qualified public defender to handle. We have a shortage of felony-qualified public defenders.
- **By adding a new offense to the repeat property statute, SB 340 will create more work and use up more resources at every stage of the criminal proceeding for these cases.** When a client is facing a prison sentence, it takes more work (e.g., evaluation, treatment resources, investigation, etc) to attempt to negotiate with the prosecutor and prepare the case for trial.
- **Could result in more people being sent to the Oregon State Hospital.**

This bill would make a giant mess of discovery, which the defense already does not receive in a timely fashion. Discovery across counties with multiple victims over a year long period would be next to impossible. The crimes would be investigated by multiple law enforcement agencies, meaning that there would be police reports from different

jurisdictions. The DDA would be responsible for tying all the offenses together, which would undoubtedly be problematic.

SB 340. SECTION 1 - This change would allow the state to prosecute a defendant in any county where one offense occurred when there were multiple cross-county offenses within a 180 day period against the same victim. **This is meant to protect corporations, not Oregonians.** It would be incredibly rare that this would actually apply to someone other than a corporation. **This will allow the state to forum shop for the harshest jurisdiction to prosecute a defendant**. E.g. If a defendant shoplifts from Fred Meyer in Portland and Washington County, the state would combine it and prosecute in **Washington County**.

This will lead to people being subject to multiple, illegal prosecutions due to lack of coordination between DA's offices and city prosecutors. There are already instances in which, due to poor communication, both a city and a county will file charges on the same incident. These eventually get dismissed, but often not before the defendant has been summoned to court and possibly had a warrant issued. It's easy to envision how this change will create that scenario on a broader scale: County A prosecutor charges a defendant with Theft in the Second Degree, but later dredges up another theft in County B and charges them for Theft in the First Degree. Defendant pleads out and thinks everything is done. Meanwhile, County B prosecutor, who is unaware of the prosecution in County A, charges the defendant for the same conduct. The defendant then misses court on the County B prosecution, gets arrested, goes to jail, and is forced to prove that they already pled to the conduct**. Proving the double jeopardy issue that will fall on the defense bar to sort out, since judges and prosecutors will likely ignore defendants saying "I already took care of that in County A."**

This does not make sense from a practical sense either, since the witnesses in these cases are loss prevention officers (LPO's) who work in the stores where the offenses occurred. Thus, **the state would be requiring the witnesses and the defendant to travel to another jurisdiction**, just so the state can have a judge that will sentence defendant to the maximum sentence.

This could also cause problems with supervision, since the jurisdiction of supervision is where the conviction occurs. While there can be an exception if the person has a stable residence in another county, that would not help transient or housing-insecure individuals who would then be forced to live in a jurisdiction for supervision, just because one of the offenses they committed occurred there.

SB 340. SECTION 2 and 3 - Adds their organized retail theft to the BM57 (137.717) framework on tier 1 with Burglary and Aggravated Theft. **It is disproportionate and unfair to place this offense in the same category of Burglary in the First Degree, Aggravated Theft in the First Degree, and Aggravated ID Theft, which all involve more serious conduct or twice the value of "Organized Retail Theft."**

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SB 340. SECTION 4 – This section amends Theft in the First Degree to include thefts where the defendant recklessly engages in conduct that creates a substantial risk of serious physical injury to another person. **This can turn a Class C misdemeanor Theft in the Third Degree into a Class C felony Theft in the First Degree because of a *risk* of serious physical injury - i.e. someone may not have even been injured.** In the scenarios where the "risk of serious physical injury" is legitimate, it is already covered by another felony (Robbery). This change would also result in LPO's using excessive force in many more situations.

SB 340. SECTION 5: Amends Organized Retail Theft to extend the period of aggregation from 90 days to 180 days. **This will obviously capture more behavior and result in stacking up more charges.**

SB 340. SECTION 6: Creates a yearlong aggregation period for theft, regardless of whether the same or different victims. **This is beyond absurd**. This essentially transforms theft into a status offense--instead of prosecuting people for stealing, the state can now prosecute them for being a thief, with the value, and corresponding offense level, unrelated to any specific instance of conduct, but instead ratcheting up based on the aggregate of thefts committed in the course of a year. Practically speaking, **the cases that come out of this will be a mess**. It's easy to envision a single theft charge based on thefts committed in different stores, which are in different cities, and investigated by different law enforcement agencies. That will make discovery a mess, since defense attorneys will have make sure the DA is gathering and providing them with the variety of police and LPO reports. **In terms of resource usage, this is going to lead to longer and more complicated trials**, since prosecutors will have to call a parade of LPOs and cops to get to their desired aggregate value. **This will also lead to more trials**, since the evidence making up a single theft will vary in strength, and it will often be worth going to trial on the theory that defendant did these 3 shoplifts (worth $750), but not the 4th one, where the evidence is weakest (worth the final $250), so they should convicted of a Theft in the Second Degree instead of Theft in the First Degree.

SB 318 establishes two general funds for addressing organized retail theft. The first is for "programs" that address the issue and can be granted to cities/counties, community organizations, or the department of justice. There is very little substance regarding the goals of the fund. There should be a preference for programs that divert cases out of the criminal legal system and seek to address the issue without further investment in law enforcement. **The bill also needs to define "organized retail theft," so that it actually targets subjects that are organized, and not those simply desperate to feed themselves or their substance use disorder.** The second fund, which appears to be a blank check, goes to law enforcement to deal with this issue.

OCDLA urges this Committee to NOT PASS SB 318 and SB 340.

Contact: Mae Lee Browning, OCDLA Legislative Director, mlbrowning@ocdla.org, 310-227-7659