

Virginia State Crime Commission

Financial Exploitation of Incapacitated Adults

2012

Financial Exploitation of Incapacitated Adults

Executive Summary

During 2012, Delegate Robert Bell requested the Crime Commission to review the topic of financial exploitation of incapacitated adults. The scope of the study was limited to a review of the recent bills that had been introduced during the 2012 Regular Session of the Virginia General Assembly, the current common law larceny crimes that exist in Virginia, and a brief overview of other state statutes that specifically criminalize financial crimes against the elderly or incapacitated adults. In addition, victims' rights advocates, law enforcement, prosecutors, and relevant stakeholder groups were contacted for information on the problems of financial exploitation in Virginia.

Currently, 33 other states have enacted some form of specific statute criminalizing the financial exploitation of an elderly or incapacitated person; an additional 5 states have not created a new criminal offense in this area, but statutorily provide for greater penalties if the victim of a larceny, embezzlement or fraud is elderly or incapacitated.

In Virginia, as nationally, financial crimes against the elderly appear to be on the rise. Anecdotal information gathered from Virginia indicates that in many cases, where there is clear evidence of financial exploitation or a fraud being committed upon a mentally incapacitated adult, the defendant can be successfully prosecuted. Virginia's use of common law principles in defining the crimes of larceny, embezzlement, and fraud, assists prosecutors in these cases; the broad elements in the common law crimes makes them applicable to a wide variety of situations where a victim, with limited understanding or mental capacities, has been financially exploited. Instances where a defendant misuses a legal power of attorney for personal gain are particularly apt to result in a successful prosecution.

However, in cases where the victim is not clearly mentally incompetent, and no outright fraud has occurred, prosecution is difficult in Virginia. Many of these cases involve friends or relatives of the victim, who convince the victim to provide them with gifts or money. These situations are the most difficult; it can be unclear if any criminal laws have been broken, and prosecutors struggle to determine if a criminal prosecution is warranted.

The Crime Commission voted to endorse legislation that would create a new, statutory crime in Virginia to address these instances of financial exploitation. The new crime would be applicable to everyone, not just those who have a fiduciary duty of care to the victim. It would make use of existing terms that are currently used in Virginia criminal law, and not attempt to create any new definitions or introduce new legal terms. The concept of "mental incapacity," for purposes of this new crime, would parallel the concept as it is defined in Va. Code § 18.2-67.10(3), which applies to sexual assaults.

The victim must have a condition, existing at the time of the offense, which prevents them from understanding the nature or consequences of the financial transaction which is the basis of the prosecution, and the accused must have known, or should have known, about the victim's condition. As a safeguard, the new statute would not apply to anyone who acted for the benefit of the mentally incapacitated adult.

The Crime Commission's recommended legislation was introduced by Delegate Robert Bell during the Regular Session of the 2013 General Assembly, as House Bill 1682. The bill was passed by both the House of Delegates and the Senate, and was signed into law by the Governor.

Background

Several recent news reports and studies have indicated that the rates of financial crimes against the elderly (typically defined as 65 years and older) have increased in the past few years.¹ Data collected by the Criminal Justice Research Center of the Virginia Department of Criminal Justice Services, using the Incident-Based Reporting System Data provided by the Virginia State Police, showed that between 2001 and 2007, overall state financial crimes increased at a rate of 8.6%; however, for victims aged 65 or older, the rate increased by 18%.² The losses suffered by elderly victims of financial exploitation can be devastatingly large; a 2010 study that consisted of interviews with 54 elder adults (average age of 76 years) and their case workers in Virginia, and an in-depth review and analysis of the crimes and abuse they suffered, revealed that the average dollar amount the victims lost was \$87,967.³

FINANCIAL EXPLOITATION BILLS INTRODUCED IN 2012

Corresponding with the apparent increase in these types of crimes, recent Sessions of the Virginia General Assembly have seen a number of bills introduced to criminalize the financial exploitation of the elderly or the mentally incapacitated. During the 2012 Regular Session of the Virginia General Assembly, there were four Senate bills and seven House Bills introduced that dealt in some manner with this topic.⁴ These bills took a number of different approaches. House Bill 125 (HB 125), introduced by Delegate Terry Kilgore, reaffirmed the existing law that if someone with a power of attorney violates his duties and converts funds belonging to the principal, he is guilty of embezzlement. House Bill 700 (HB 700), introduced by Delegate Eileen Filler-Corn, House Bill 982 (HB 982), introduced by Delegate James Scott, and Senate Bill 285 (SB 285), introduced by Senator Mark Herring, all took existing statutory crimes and created a new, additional offense if the victim of the existing crime was an incapacitated or elder adult. The other bills—Senate Bill 222 (SB 222), introduced by Senator Mark Herring, Senate Bill 431 (SB 431), introduced by Senator Richard Stuart, Senate Bill 443 (SB 443), introduced by Senator Jill Vogel, House Bill 409 (HB 409), introduced by Delegate Vivian Watts, House Bill 690 (HB 690), introduced by Delegate Kenneth Plum, House Bill 882 (HB 882), introduced by Delegate Mark Sickles, and House Bill 987 (HB 987), introduced by Delegate Manoli Loupassi—all created a proposed new statutory crime of “financial exploitation,” one of the elements of which would be using “undue influence,”

“coercion,” and “manipulation” or “harassment,” to obtain property from someone who was elderly or mentally incapacitated.⁵

All of the Senate bills were rolled into SB 431, which was passed by the Senate, modified in the House Courts of Justice Committee, and then left in the House Appropriations Committee. House Bill 125 was passed by the House Courts of Justice Committee, and then left in the House Appropriations Committee. All of the other House bills were rolled into HB 987, which was modified in the House Courts Committee, and then left in the House Appropriations Committee. In sum, no bills dealing with the issue of financial exploitation were passed by the Virginia General Assembly in 2012.

CURRENT COMMON LAW LARCENY CRIMES IN VIRGINIA AND THE REQUIREMENT OF CONSENT

Virginia currently recognizes the four main types of “theft” or larceny crimes that developed under the common law: larceny, embezzlement, larceny by trick, and false pretenses. Larceny is the “wrongful or fraudulent taking of personal goods of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently.”⁶ Embezzlement occurs when a person “wrongfully and fraudulently uses, disposes of, conceals or embezzles...personal property...which he shall have received for another or for his employer...or by virtue of his office, trust, or employment, or which shall have been entrusted or delivered to him by another.”⁷ Under the common law, it is not a defense to embezzlement that the defendant misappropriated the property for the benefit of a third party.⁸ Larceny by trick occurs when a larceny is accomplished by tricking or fooling the victim into voluntarily turning over possession of an item.⁹ False pretense, or fraud, is similar to larceny by trick, in that the victim is tricked or fooled into voluntarily giving the defendant personal property; the difference is that in false pretenses, the defendant obtains title to the item, as well as physical possession.¹⁰

For the crimes of larceny and embezzlement, the lack of consent of the victim is an element of the crime that must be proven. For the crimes of larceny by trick and false pretenses, consent is usually not an issue, because consent has been obtained, though illegally. The common law recognized, for all manners of larceny, that consent could only be valid if it was a voluntary or knowing consent. Consent could not be obtained by reason of infancy, insanity or intoxication; or if obtained by force or threatened force (which would be the crime of robbery), or fraud.¹¹

While there are no cases in Virginia that deal specifically with the issue of consent in the context of either larceny or embezzlement, some appellate courts in other states have held that consent cannot be obtained from a person who is mentally incapacitated. For example, the Alabama Court of Criminal Appeals has held that if a defendant is aware that a victim is not mentally competent, and takes advantage of this fact in order to gain unauthorized control of the victim’s funds, by “convincing” the victim to transfer large amounts of money into a joint bank account, a conviction for theft of property can be sustained.¹² Similarly, the Supreme Court of Connecticut has held that a defendant can be convicted of larceny if they rely upon the victim’s mental incapacity in order to facilitate transfers of property; “The witnesses’ testimony as to the victim’s mental

incapacity, coupled with evidence that the defendant was siphoning the victim's accounts, supports the trial court's conclusions that: (1) the victim lacked the capacity to understand the transfers or consent to them; and (2) the defendant had been unduly influencing the victim in the transfer of her assets."¹³ The New York Supreme Court, Appellate Division, in a memorandum opinion, issued a nearly identical holding; "In reviewing the evidence, we conclude that the People proved beyond a reasonable doubt that the victim was incapable of consenting to the defendant's actions and that the defendant was cognizant of her diminished mental capacity, yet continued to deplete her assets."¹⁴ And, the Michigan Court of Appeals used similar legal reasoning in holding that a written agreement, signed by the victim, purporting to give consent for the defendant to use the victim's money for the defendant's own purposes, did not preclude a conviction for larceny.¹⁵ The Michigan Court of Appeals noted that the mental status of the victim "is relevant to the underlying question whether [the victim] had the capacity to consent."¹⁶

At least two states have taken this concept of mental incapacity creating a bar to a claim that there was a valid consent given by the victim, and through statute made it applicable to larceny cases.¹⁷ Title 18 of the Revised Statutes of Colorado states:

Unless otherwise provided by this code or by the law defining the offense, assent does not constitute consent if...It is given by a person who, by reason of immaturity, mental disease or mental defect, or intoxication, is manifestly unable and is known or reasonably should be known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense.¹⁸

And, the Texas Penal Code states:

"Effective consent" includes consent by a person legally authorized to act for the owner. Consent is not effective if: (A) induced by deception or coercion; (B) given by a person the actor knows is not legally authorized to act for the owner; (C) who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions; (D) given solely to detect the commission of an offense; or (E) given by a person who by reason of advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property.¹⁹

OTHER STATE STATUTES CRIMINALIZING FINANCIAL EXPLOITATION

Currently, 33 other states have enacted a specific statute that criminalizes the financial exploitation of an elderly or incapacitated person.²⁰ It should be noted, however, that in Oregon, South Dakota, and Tennessee, the statute only applies if the defendant has an affirmative legal duty to care for the victim, and then carries out the financial exploitation.²¹ An additional five states do not create a specific crime of financial exploitation, but statutorily enhance the penalty for anyone who commits a regular act of larceny, embezzlement, or fraud against an elderly or “at risk” adult.²² Eleven states, in addition to Virginia, have not enacted any statutes in this area.²³

Of the 33 states that have a specific statute criminalizing financial exploitation, Utah’s is the most comprehensive and strict. Anyone age 65 or older is defined as a “vulnerable adult”; it is not a defense to the crime of exploiting a vulnerable adult that the defendant was unaware of the age of the victim; it applies to anyone who has any kind of a business relationship with the victim; and a person is deemed to have violated the statute if he conceals the “preexisting condition of any property involved in a contract or agreement.”²⁴ Another state with a fairly broad financial exploitation statute is Mississippi, which makes it unlawful to “exploit any vulnerable person.”²⁵ The term “exploit” is defined as the “illegal or improper use of a vulnerable person or his resources...with or without the consent of the vulnerable adult,” while a “vulnerable person” is defined as anyone “whose ability to perform the normal activities of daily living...is impaired due to a mental, emotional, physical or developmental disability or dysfunction, or brain damage or the infirmities of aging.”²⁶

By way of contrast, New Mexico’s financial exploitation statute is very limited in whom it covers; it only applies to residents of a care facility, although an individual’s own home can be considered a care facility, if the person receives nursing care there.²⁷ The statute criminalizes “the act or process, performed intentionally, knowingly, or recklessly, of using a resident’s property for another person’s profit, advantage or benefit, without legal entitlement to do so.”²⁸

Alabama’s financial exploitation statute provides a good example of the approach used by many states. A “protected person” includes any adult “that is mentally or physically incapable of adequately caring for himself or herself and his or her interests without serious consequences to himself or herself or others.”²⁹ It is a crime to “exploit” any protected person, and the term is defined as the “expenditure, diminution, or use of the property, assets, or resources of a protected person without the express voluntary consent of that person or his or her legally authorized representative.”³⁰

Anecdotal Information about Financial Exploitation in Virginia

Crime Commission staff informally solicited requests for examples in Virginia where an elderly adult was the victim of financial exploitation. A number of stakeholders and interest groups were invited to meet with staff for a frank discussion of the problems of elder abuse and financial exploitation of the mentally incapacitated in Virginia: the

AARP Virginia, the Alzheimer’s Association, the Virginia Network for Victims and Witnesses of Crimes, the Virginia Department of Social Services, the Virginia Poverty Law Center, the Virginia Association of Area Agencies on Aging, and the Office of the County Executive for Fairfax County. Commonwealth’s Attorneys, law enforcement, and victims’ rights advocates were also contacted for any information they could provide on specific cases, which would help to provide “real world” illustrations of the problem. It must be emphasized that this request was not a true survey, and cannot be considered anything more than a general gathering of selected anecdotal evidence.

In some of the reported cases, what initially appeared to be a case of financial exploitation eventually was discovered to be a situation where family relatives were upset on how the “victim” was spending his or her own money, and no exploitation had actually occurred. In a number of other cases, where there had clearly been some form of financial exploitation, criminal charges ultimately were filed against the perpetrator. In all reported cases where charges were filed, the defendant either pled guilty or was found guilty of embezzlement, fraud, or forging or uttering checks. It therefore appears that when there is incontrovertible proof that an elderly victim has been swindled, or has had money inappropriately taken from them, law enforcement and prosecutors are able to successfully prosecute defendants in Virginia.

From the reported cases, it also appears that when financial exploitation involves a power of attorney, it is much easier to prosecute the defendant than in instances where there is no fiduciary duty between the parties. This is to be expected, as a power of attorney creates an affirmative duty to not use this status for self-enrichment, and when it can be demonstrated that a person has misused their authority for financial gain, it becomes much easier to obtain a conviction. On the other hand, instances where the victim was not clearly mentally incompetent, and was convinced by a “friend” or relative to give gifts or money, are the most difficult, both in terms of determining whether any laws have been broken, and whether it is proper for a prosecution to proceed. A number of the reported cases involved fact patterns where some type of financial exploitation was alleged to have occurred, yet it was not clear if any criminal laws had actually been broken. Many of these indeterminate cases involved a victim who shortly thereafter was placed in the care of a conservator, or who probably would have met the standard for being placed in a conservatorship; i.e., was an incapacitated person, incapable of managing their financial affairs without assistance.³¹

Policy Considerations

Based upon the review of the current larceny offenses in Virginia, the overview of how other states have statutorily dealt with the problem of financial exploitation of the elderly and mentally incapacitated, and the anecdotal information provided to the Crime Commission about exploitation cases occurring in Virginia, four policy options were identified:

Option 1: Keep Virginia’s laws as they currently are, with no changes. It is already possible, in clear-cut cases of financial exploitation, to successfully prosecute the wrong-doers.

Option 2: Keep Virginia’s criminal laws as they currently are, with no substantive changes, but statutorily define “consent,” as was done in Texas and Colorado, to make clear that a person who is mentally incapacitated cannot give valid consent for the transfer of their property.

Option 3: Keep Virginia’s existing larceny crimes as they currently are, but provide for a heightened penalty if the victim is mentally incapacitated. Under this option, there are a number of possibilities for how the term “mentally incapacitated” could be defined:

- The definition provided in the conservatorship Chapter of the Virginia Code:

“Incapacitated person” means an adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment alone shall not be considered sufficient evidence that the individual is an incapacitated person within the meaning of this definition.³²

- The definition provided in the Adult Services Chapter of the Virginia Code:

“Incapacitated person” means any adult who is impaired by reason of mental illness, intellectual disability, physical illness or disability, advanced age or other causes to the extent that the adult lacks sufficient understanding or capacity to make, communicate or carry out responsible decisions concerning his or her well-being.³³

- A more expansive definition, such as the one proposed in the final version of HB 987:

“Mental or physical incapacity” means mental illness, intellectual disability, dementia, organic brain dysfunction, developmental disability, physical illness, injury, or disability that would impair the person’s mental or physical ability to manage his money, assets, property, or financial resource;³⁴

or the definition proposed in HB 882, as introduced:

“Vulnerable adult” means any person 18 years of age or older who suffers from a mental illness, mental retardation, dementia, organic brain dysfunction, developmental disability, physical

*illness or disability, or other causes that would impair the person's mental or physical ability to manage his money, assets, property, or financial resources to the extent that the adult lacks sufficient understanding or capacity to make, communicate, or carry out reasonable decisions regarding his money, assets, property, or financial resources.*³⁵

Option 4: Create a new statutory crime that is more expansive than the current crimes of larceny, embezzlement, and false pretenses. Under this option, there are two possibilities:

- The new crime could employ only those terms that are currently or regularly used in the criminal law of Virginia as in the final version of House Bill 987; e.g., “*obtain, with the intent to defraud.*”³⁶
- The new crime could employ novel terms or definitions that are broader in scope than those currently used in the criminal law of Virginia; e.g., *undue influence, coercion, harassment, manipulation.*³⁷

Also, under Option 4, there are three possibilities as to whom the new statute would apply:

- Only to those who have a fiduciary duty to the victim;
- Only to those who have a fiduciary duty, or a legal duty to provide care to the victim; or
- A general applicability to everyone; any person who violated the statute, and financially exploited a mentally incapacitated person, would be guilty.

Conclusion

The Crime Commission reviewed the information on financial exploitation, and recognized its seriousness as a growing area of crime, both nationwide and in Virginia. The members voted to endorse legislation to create a new statutory crime that would penalize financial exploitation, yet would make use of existing terms that are currently used in Title 18.2 of the Code of Virginia. The new crime would be applicable to everyone, not just those who have a fiduciary or legal duty to the mentally incapacitated adult. The term “mentally incapacitated” would be defined in a manner parallel to the definition provided in Va. Code § 18.2-67.10(3), which applies to sexual assaults:

“Mental incapacity” means that condition of the complaining witness existing at the time of an offense under this article which prevents the complaining witness from understanding the nature or consequences of the sexual act involved in such offense and about which the accused knew or should have known.

As a safeguard, the new statute specifically would not apply to anyone who acted for the benefit of a mentally incapacitated adult.

Delegate Robert Bell introduced House Bill 1682 during the 2013 General Session of the Virginia General Assembly, based on the Crime Commission recommendation. This bill was passed by both the Virginia Senate and the Virginia House of Delegates and was signed by the Governor.³⁸

¹ See, e.g., Philip Moeller, *Protecting Elders From Financial Abuse*, U.S. NEWS & WORLD REPORT (Nov. 20, 2012), <http://money.usnews.com/money/blogs/the-best-life/2012/11/20/protecting-elders-from-financial-abuse>; Jennifer Sergent, *Trusting the Wrong People: Current Virginia laws are murky on financial exploitation*, AARP BULLETIN (Nov. 1, 2012), www.aarp.org/money/scams-fraud/info-11-2-12/trusting-the-wrong-people-va.print.html; Michelle Singletary, *How to help fight fraud against the elderly*, WASH. POST (Nov. 8, 2011), http://articles.washingtonpost.com/2011-11-08/business/35284677_1_investor-protection-institute-senior-citizens-financial-exploitation; *Financial Exploitation of the Elderly*, U.S. DEPT. OF JUSTICE, NAT. INST. OF JUSTICE (Jan. 5, 2011), <http://www.nij.gov/topics/crime/elder-abuse/financial-exploitation.htm>.

² Information provided by e-mail from the Va. Dept. Criminal Justice Services, Criminal Justice Research Center.

³ SHELLY JACKSON & THOMAS L. HAFEMESITER, FINANCIAL ABUSE OF ELDERLY PEOPLE VS. OTHER FORMS OF ELDER ABUSE: ASSESSING THEIR DYNAMICS, RISK FACTORS, AND SOCIETY’S RESPONSE, Final Report to the U.S. Dept. of Justice, National Institute of Justice, grant number 2006-WG-BX=0010, February 2011, <https://www.ncjrs.gov/pdffiles1/nij/grants/233613.pdf>.

⁴ S.B. 222, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); S.B. 285, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); S.B. 431, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); S.B. 443, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); H.B. 125, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); H.B. 409, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); H.B. 690, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); H.B. 700, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); H.B. 882, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); H.B. 982, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); H.B. 987, 2012 Gen. Assemb., Reg. Sess. (Va. 2012).

⁵ There were slight differences between each of these bills.

⁶ *Dunlavey v. Commonwealth*, 184 Va. 521, 524 (1945).

⁷ VA. CODE ANN. § 18.2-111 (2012). “A person entrusted with possession of another’s personality who converts such property to his own use or benefit is guilty of the statutory offense of embezzlement.” *C.D. Smith v. Commonwealth*, 222 Va. 646, 649 (1981).

⁸ “[I]t is not necessary to show that the defendant misappropriated the property for his own personal use and benefit; it is sufficient to show that the defendant took the property to benefit another.” *Wells v. Commonwealth*, 60 Va. App. 111, 118-119 (2012).

⁹ Larceny by trick is “when one obtains the property of another by making a false representation of a past event or an existing fact with the intent to defraud the owner of the property by causing the owner of the property to part with the property.” *Owolabi v. Commonwealth*, 16 Va. App. 78, 79 (1993).

¹⁰ False pretenses involves “(1) an intent to defraud; (2) an actual fraud; (3) use of false pretenses for the purpose of perpetrating the fraud; and (4) accomplishment of the fraud by means of the false pretenses...that is, the false pretenses to some degree must have induced the owner to part with his property.” *Riegert v. Commonwealth*, 218 Va. 511, 518 (1977).

¹¹ 1 CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW, § 46, p. 304 (14th ed. 1978).

¹² *Gainer v. State*, 553 S.2d 673 (Ala. Crim. App. 1989).

¹³ *State v. Calonico*, 770 A.2d 454, 469 (Conn. 2001).

¹⁴ *People v. Camiola*, 225 A.D.2d 380, 381 (N.Y.App.Div. 1st Dep. 1996).

¹⁵ *People v. Cain*, 605 N.W.2d 28, 44 (Mich. App. 1999).

¹⁶ *Id.*

¹⁷ By way of contrast, Virginia statutorily makes lack of mental capacity a bar to a valid consent by the victim only for sex crimes. VA. CODE ANN. § 18.2-67.10 (3) (2012).

¹⁸ COLO. REV. STAT. ANN. § 18-1-505 (West 2012). This statute is applicable to other crimes, as well as larceny.

¹⁹ TEX. PENAL CODE ANN. § 31.03(3) (West 2012).

²⁰ ALA. CODE § 38-9-7 (West 2012); ARK. CODE ANN. § 5-28-103 (West 2012); DEL. CODE ANN. tit. 31, § 3913 (West 2012); FLA. STAT. ANN. § 825.103 (West 2012); GA. CODE ANN. § 30-5-8 (West 2012); IDAHO CODE ANN. § 18-1505 (West 2012); 720 IL COMP STAT. ANN. § 5/17-56 (West 2012); IND. CODE ANN. § 35-46-1-12 (West 2012); KAN. CRIM. CODE. ANN. § 21-5417 (West 2012); KY. REV. STAT. ANN. § 209.990 (West 2012); LA. REV. STAT. ANN. § 14:93.4 (West 2012) & LA. REV. STAT. ANN. § 14:67.21 (West 2012); MD. CODE ANN., CRIM. LAW § 8-801 (West 2012); MICH. COMP. LAWS ANN. § 750.174a (West 2012); MINN. STAT. ANN. § 609.2335 (West 2012); MISS. CODE ANN. § 43-47-19 (West 2012); MO. ANN. STAT. § 570.145 (West 2012); MONT. CODE ANN. § 52-3-803 (2012); NEB. REV. STAT. § 28-358 (Michie 2012); NEV. REV. STAT. ANN. § 200.5092 (West 2012); N.M. STAT. ANN. § 30-47-6 (West 2012); N.C. GEN. STAT. ANN. § 14-112.2 (West 2012); N.D. CENT. CODE ANN. § 12.1-31-07.1 (West 2012); OKLA. STAT. ANN. tit. 21, § 843.4 (West 2012); OR. REV. STAT. ANN. § 163.205 (West 2012) & OR. REV. STAT. ANN. § 443.881 (West 2012); R.I. GEN. LAWS ANN. § 11-68-2 (West 2012) and R.I. GEN. LAWS ANN. § 11-41-5 (West 2012); S.C. CODE ANN. § 43-35-10 (Law Co-op 2012); S.D. CODIFIED LAWS § 22-46-3 (Michie 2012); TENN. CODE ANN. § 71-6-102 (West 2012); TEX. PENAL CODE ANN. § 32.53 (West 2012); UTAH CODE ANN. § 76-5-111 (West 2012); VT. STAT. ANN. tit. 13, § 1380 (West 2012); W. VA. CODE ANN. § 61-2-29b (West 2012); WYO. STAT. ANN. § 6-2-507 (West 2012).

²¹ OR. REV. STAT. ANN. § 163.205 (West 2012) & OR. REV. STAT. ANN. § 443.881 (West 2012); S.D. CODIFIED LAWS § 22-46-3 (Michie 2012); TENN. CODE ANN. § 71-6-102 (West 2012).

²² CAL. PENAL CODE § 368(a), (d), (e) (West 2012); COLO. REV. STAT. ANN. § 18-6.5-103(5) (West 2012); OHIO REV. CODE ANN. § 2913.02(B)(3) (West 2012); 18 PA. CONS. STAT. ANN. § 4107(a.1)(3) (West 2012); WIS. STAT. ANN. § 943.20(3)(6) (West 2012). In these states, the statutory provision providing for the heightened penalty if the victim is an elderly or incapacitated adult references a separate statutory crime of theft or larceny that is applicable to everyone.

²³ Alaska, Arizona, Connecticut, Hawaii, Iowa, Maine, Massachusetts, New Jersey, New Hampshire, New York, and Washington.

²⁴ UTAH CODE ANN. § 76-5-111 (West 2012).

²⁵ MISS. CODE ANN. § 43-47-19 (West 2012).

²⁶ *Id.* The Mississippi Supreme Court has found the expansive wording and potential application of this statute troubling, noting in dicta, “We are troubled by the statute’s broad reach.” *Decker v. State*, 66 So.3d 754, 658 (2011).

²⁷ N.M. STAT. ANN. § 30-47-6 (West 2012).

²⁸ *Id.*

²⁹ ALA. CODE § 38-9-7 (West 2012).

³⁰ *Id.*

³¹ VA. CODE ANN. § 64.2-2000 (2012).

³² *Id.*

³³ VA. CODE ANN. § 63.2-1603 (2012).

³⁴ H.B. 987, 2012 Gen. Assemb., Reg. Sess. (as reported by Va. H. Cts. of Justice Comm., Feb. 3, 2012).

³⁵ H.B. 882, 2012 Gen. Assemb., Reg. Sess. (as introduced) (Va. 2012).

³⁶ H.B. 987, 2012 Gen. Assemb., Reg. Sess. (as reported by H. Cts. of Justice Comm., Feb. 3, 2012).

³⁷ *See*, S.B. 431, 2012 Gen. Assemb., Reg. Sess. (as introduced) (Va. 2012).

³⁸ 2013 Va. Acts ch. 419.