OFFICE OF THE ATTORNEY GENERAL
Official Opinion No. 2018-4

April 3, 2018

OFFICIAL OPINION NO. 2018-4

Mr. Pat Harrington
Tippecanoe County Prosecutor
111 North 4th Street, 3rd Floor
Lafayette, IN 47901

Dear Prosecutor Harrington:

You requested an official opinion of the Attorney General regarding the lawfulness of a privately instituted, pre-arrest "deferred prosecution" program offered by a large, well-known "big box" retailer at its three (3) locations within your jurisdiction of Tippecanoe County, Indiana. Our legal opinion on the matter, applied to the facts as you presented them to us, and as further verified through the cooperation of representatives of the retailer, is as follows:

ISSUE PRESENTED

Whether a private "restorative justice" deferred prosecution program offered to shoplifting suspects in lieu of notifying police of the suspect's apprehension is lawful.

BRIEF ANSWER

The deferred prosecution program known as "Restorative Justice" offered by the Corrective Education Company ("CEC"), potentially violates a number of legal and ethical provisions applicable in Indiana. While the program's deviation from acceptable legal norms is troubling and should not continue, it does not appear to us that these departures were in any way willful or intentional. However, significant changes would have to be introduced and immediately implemented in order for the program's operations to be regarded by us as lawful and ethically sound in Indiana.

FACTUAL BACKGROUND

The Parties

1. *The Program Operator–* **CEC, Salt Lake City, UT**

CEC, based in Salt Lake City, Utah, (www.correctiveeducation.com) is engaged solely in the business of providing an "alternative to judicial prosecution" (*sic*) to retailers through a behavior modification course for "first-time" shoplifting suspects.

The Retailer– **Walmart, Bentonville, AR**

The retail chain in this case is Walmart, headquartered in Bentonville, Arkansas. The program is operated under a contract with CEC, at 36 Walmart stores in Indiana, three of which are located within Tippecanoe County, where the requestor has jurisdiction as the duly elected Prosecuting Attorney.

The Suspect–

A person accused of shoplifting by the Retailer. According to the Retailer, under conventional circumstances, such an individual would typically be arrested forthwith, as a shoplifter for whom evidence to a standard of "probable cause" had been established. However, the suspect will not be arrested or in any way held in further custody, if found eligible for the program at issue. "First-time offender" is a person caught shoplifting for the first time at any Walmart location.

The Program:

1. *Overview–*

CEC offered a "restorative justice" program for Walmart, and for no other retailers in Indiana. Indiana locations where this program has been offered include Beech Grove, Kokomo, and Lafayette.

Walmart stated that it adopted this program offered by CEC because it believed that the program was a more effective way to cope with what Walmart sees as a "growing problem" of shoplifting. Walmart also cites what it perceives as the hostility of the justice system to the high volume of cases brought by its stores. The lack of support has become so apparent that ordinances have been passed in cities such as Kokomo and Beech Grove, where entities like Walmart can be declared "public nuisances", and assessed monetary fines for calling the police too often.[1] It should be noted, as of November 20, 2017, that the would-be public "nuisance" known as Walmart is the single largest private-sector employer in the State of Indiana.[2]

2. *How it Works–*

A person suspected of shoplifting is detained by a Walmart agent or employee and escorted in temporary custody to the loss-prevention area of the store. A person trained in the program obtains personal identification information from the suspect and runs the data to determine if he or she is a "first-time offender" at a Walmart location. In order to qualify for the program, the suspect has to be a first-time offender and between the ages of 18 and 65 years old.

If eligible, the suspect watches a four-minute CEC video and is offered a choice: (1) enter into a contract with CEC to pay $400[3] and complete an "education course" via a six-hour on-line program; or (2) decline the program and subject himself to immediate referral to law enforcement, meaning arrest. The contract also generally requires the suspect to sign a written confession. *See generally People v. Corrective Education Co.*, 2017 WL 1366020 (Cal. Ct. App. April 13, 2017); *People v. Corrective Education Co.*, No. CGC-15-549094, Order Granting Motion for Summary Judgment (CEC program constitutes extortion and false imprisonment under California law). To facilitate compliance with the program, a "personal coach," who is actually a CEC employee trained in debt collection and acting as such[4], is assigned to the suspect.

The required education course is available via the internet, lasts about six hours in all, and focuses on "antisocial behavior and . . . life skills for employment/career, goal-setting, financial literacy, and impulse control." *See* CEC Program Overview (August 15, 2017) (available from CEC and/or the author). CEC concedes that it does not follow through with legal action if a suspect fails to pay the entire fee, or if he fails to complete the on-line program. It also appears that many if not all of the "repeat offenders" who are ineligible for the program in actual practice are never arrested, charged, or prosecuted.

Walmart has affirmed that it does not receive, directly or indirectly, any profit or any proceeds from the CEC program other than a reduction in time and cost in prosecuting shoplifters. We have not seen any evidentiary support for the suggestion that CEC actually pays retailers or other outside security firms an incentive for each person enrolling in the program. *See People v. Corrective Education Company*, No. CGC-15-549094 (Complaint filed Nov. 23, 2015).

In Indiana in 2017, 1,225 suspects were determined not to be eligible for the program, 222 were deemed eligible, and of that number, 213 signed the contract and entered the program.[5] Troubling aspects of the program as it exists in Indiana were first brought to the attention of this Office by the requestor, the Prosecuting Attorney of Tippecanoe County.

LEGAL ANALYSIS

The problem for Walmart with this program began with CEC selling it a product and a process that were not well thought out in terms of the legal and public policy implications of removing prosecutorial discretion and judicial review from the process. For example, it is fundamental that a criminal case is not the "property" of the financial victim.

The laws of Indiana grant to any retailer the unusual authority to detain and hold a private citizen for suspected shoplifting, even though the retailer does not have "law enforcement powers." This modest grant of authority is made for the sole purpose of allowing the retailer to find out what was stolen and who stole it, and then having done so, to make the individual wait for the police to arrive. When one deviates from these limited goals, one is arguably undermining the public policy basis for allowing the detention to take place.

The reasonable detention period provided for in Indiana's Shoplifting Detention Act, codified at Ind. Code §

5-33-6-2 *[IC 35-33-6-2]*, is delineated as follows:

(a) An owner or agent of a store who has probable cause to believe that a theft has occurred or is occurring on or about the store and who has probable cause to believe that a specific person has committed or is committing the theft,

(1) may:

(A) detain the person and request the person to identify himself or herself;

(B) verify the identification;

(C) determine whether the person has in the person's possession unpurchased merchandise taken from the store;

(D) inform the appropriate law enforcement officers; and

(E) inform the person's parents or others interested in the person's welfare that the person has been detained; . . .

To ensure that rights are not abused and are properly balanced in the retailer detention scenario, our law warns that, "The detention must: (1) be reasonable and *last only for a reasonable time*; and (2) not extend beyond the *arrival of a law enforcement officer* or two (2) hours, whichever first occurs. Ind. Code § 35-33-6-2(c) (emphasis supplied).

When probable cause to detain is present, detention is lawful, *Dietz v. Finlay Fine Jewelry Corp.*, 754 N.E.2d 958, 967 (Ind. Ct. App. 2001), and a civil or criminal action against an owner or agent of a store may not be based on a detention which was lawful. *See* Ind. Code § 35-33-6-4. However, a merchant may be liable in negligence for unreasonable detentions. *Wal-Mart Stores, Inc. v. Bathe*, 715 N.E.2d 954, 960 (Ind. Ct. App. 1999). The Superior Court of California found that "the suspect is detained for an appreciable time by the retailer, not for the purpose of the retailer investigating the theft, but to determine whether the suspect agrees to participate in CEC's diversion program." Order, *supra,* at 7. The retailer would be in violation of the shoplifting detention act if the period of detention exceeded the "reasonable" two-hour limitation in subsection (c) of I.C. § 35-33-6-2 or if the detention itself was not lawful because the suspect had not committed shoplifting.

CEC's *de facto* exclusion of the police from the detention/arrest equation, leaves an important legal event denuded of any cognizable historical record, devoid of any public goal-setting infrastructure or rationale, and inaccessible as an aid to public safety planning efforts. This issue is procedural, stands at the very threshold of our analysis of the lawfulness of CEC's program, and is potentially fatal, as courts typically and unstintingly swing the exclusionary axe over any evidence or pleading exhibiting this kind of due process defect. The precise point of balance between the special but limited privileges granted to store-owners, as against the right of privacy vouchsafed to suspected shoplifters, may vary to some degree from state to state without necessarily raising any issue of constitutional dimension. But the situation before us here is of a different order, for it proposes a complete circumvention which results in the compromise of an entire set of governmental roles and responsibilities that must be filtered through the 5th, 6th, and 14th Amendments to the United States Constitution (meaning the exercise of a prosecutive case screening and charging function based upon lawful public considerations, then the court's affirmed for probable cause by a "neutral and detached magistrate"). U.S. CONST. Amdts. IV & XIV.[6]

But our analysis does not stop there. We also note that the CEC "Restorative Justice" program appears to fall afoul of Indiana "substantive" criminal law as well.

The criminal offense of Confinement, defined by Indiana Code Section 35-42-3-3(a), provides:

(a) A person who knowingly or intentionally confines another person without the other person's consent commits criminal confinement. Except as provided in subsection (b), the offense of criminal confinement is a Level 6 felony.

If the circumstances found by the Superior Court of California hold true in Indiana, "the suspect is detained for an appreciable time by the retailer, not for the purpose of the retailer investigating the theft, but to determine whether the suspect agrees to participate in CEC's diversion program." Order, *supra,* at 7. "When a suspect is being told about and asked to agree to CEC's diversion program, the suspect is detained against his will because

the suspect is led to believe that the alternative to learning about and agreeing to CEC's diversion program is the retailer's calling the police." *Id*. If the detention was not lawful under the Shoplifting Detention Act, then criminal Confinement could apply to this situation.[7]

Finally, one can scarcely enter into a discussion of legal concepts of "extortion" without considering the potential applicability of the federal charter on extortion – formally titled *Interference with Commerce by Threats and Violence* (18 U.S.C. § 1951), more commonly known as the "Hobbs Act." In 1946, Congress enacted the Hobbs Act in order to expand the common-law definition of extortion to include acts by private individuals or entities. *Evans v. United States*, 504 U.S. 255, 261 (1992).

The Hobbs Act, set forth at Title 18, U.S. Code, Section 1951, provides that:

> (a) Whoever in any way or degree obstruct, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do,. . . shall be fined under this title or imprisoned not more than twenty years, or both.

The conduct of the retailer under CEC's stewardship of the program suggests that the expanded coverage and sweep of the Hobbs Act may be regarded as applicable to CEC's conduct of the program in Indiana.[8] It is, after all, as we have seen, broad enough in its sweep to cover not just forking over money improperly assessed against the victim, it includes the *fear* of having to make such a payment; the fear of *economic harm*; and the *fear of damage to one's reputation*. *See United States v. Jackson*, 180 F.3d 55, 69 (2nd Cir. 1999) (emphasis supplied).

The Hobbs Act, originally enacted to combat alleged acts of extortion on the part of large labor unions operating through job sites and local offices, regulates activities that taken as a whole are thought to have a substantial effect on interstate commerce. S*ee, e.g.*, *United States v. Bolton*, 68 F.3d 396, 399 (10th Cir. 1995). In the case at bar, we have the added fact in evidence that the extorted money directly crosses state lines–from Indiana to Utah, where CEC is a registered corporation. *See* Complaint, at 3. "In enacting the Hobbs Act, Congress determined that robbery and extortion are activities which through repetition may have substantial detrimental effects on interstate commerce." *Id*. (citing *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 1634 (1995). The object of the extortion is the payment of money from Indiana to Utah, which would satisfy the commerce element. *See United States v. Kaplan*, 171 F.3d 1351, 1355 (11th Cir. 1999) (finding that the movement of funds from Panama to Florida was the object of the extortion plan); *United States v. Eaves*, 877 F.2d 943, 946 (11th Cir. 1989) (determining that payment of monies between Georgia and Florida satisfied Hobbs Act's effect-on-commerce element); *United States v. Hollis*, 725 F.2d 377, 380 (6th Cir. 1984) (noting that interstate payment of money from which victim was extorted constituted "commerce"). CEC's act of demanding a payment of $500 to its corporation under the threat of formal prosecution could be interpreted by a reasonable person to violate the Hobbs Act.[9]

ETHICAL CONSIDERATIONS

Indiana Code Section 33-39-1-5 provides that "the prosecuting attorneys, within their respective jurisdictions, shall: (1) conduct all prosecutions for felonies, misdemeanors, or infractions . . ." This is no mere statement of aspirations; it means exactly what it says. The discretion to institute a criminal proceeding lies in the hands of the prosecutor and, particularly in Indiana, that prerogative is jealously guarded and not often shared with other state officers. *See generally Fowler v. State*, 829 N.E.2d 459, 462 (Ind. 2005). Even if he desired to do so, the law does not appear to allow a prosecutor to delegate–either formally or informally–prosecutorial authority or discretion with respect to the institution or disposition of criminal charges. Moreover, the pre-trial diversion program, authorized by Indiana Code Section 33-39-1-8(b), provides that "a prosecuting attorney" may withhold prosecution for persons charged with a misdemeanor, or a Level 5 or 6 felony.[10] The statute delivers this program into the hands of the prosecuting attorney.

The recent disciplinary case of *In re: Flatt-Moore*, 959 N.E.2d 241 (Ind. 2012), provides significant guidance, and the ethical equivalence between Flatt-Moore and the instant matter is not far to seek. In *Flatt-Moore*, a deputy prosecutor was found in violation of Indiana Rule of Professional Conduct 8.4(d), which provides broadly that, "It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice . . ." The DPA "ceded" to the victim the entirety of a restitution decision by allowing that victim to dictate the terms of the plea agreement. The Supreme Court held that:

> . . . by giving [the victim] unfettered veto power in the plea negotiations leading up to the First Plea Offer, Respondent entirely gave up her prosecutorial discretion to enter into what would otherwise be a fair and just

resolution of the charges. If a prosecutor puts the conditions for resolving similar crimes entirely in the hands of the victims, defendants whose victims are unreasonable or vindictive cannot receive the same consideration as defendants whose victims are reasonable in their demands. At very least, such a practice gives the appearance that resolution of criminal charges could turn on the whims of victims rather than the equities of each case. *Id. at 245.*

Applying those considerations here, a prosecutor who knowingly grants a retailer and/or its contractor discretion to resolve a shoplifting violation through a private diversion program could be found in violation of Rule 8.4(d). Such an ethical violation would be compounded by any actions taken by the prosecutor in coordination with the program.

CONCLUSION

The privatized, non-adjudicative program sold to Walmart fails under the weight of a number of legal and ethical objections that have been raised. To Walmart's considerable credit, this program has been voluntarily disengaged statewide.

There is probably in all of these disputes some common ground that could lead to a favorable resolution to all parties. For its part, the retailer wants to minimize waste of valuable employee time, and gratuitous financial loss. For law enforcement officers and prosecutors throughout the state, this is not a question of guarding turf; it is one of safeguarding rights and protections for our citizens. If the court system and the management and loss prevention officials of the retailer can speak openly, with truth, trust and respect, one feels that it is not an impossible task to arrive at a resolution that achieves a new level of efficiency and efficacy for the victim, while at the same time upholding the standards of accountability that are associated with enforcement of the law. We would, on behalf of the people of Indiana, welcome such a discussion.

SUBMITTED and
ENDORSED FOR PUBLICATION:

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Attorney General

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[1] *See, e.g.*, GENERAL ORDINANCE # 13 (City of Beech Grove, Indiana 2015); ORDINANCE NO. 6825 (City of Kokomo, Indiana 2016) (". . .problem areas, trouble spots, or high activity areas plac[ing] an undue burden on law enforcement resources. . .").

[2] Jeff Desjardins, The Biggest Employer in Every US State, BUSINESS INSIDER, available at http://www.businessinsider.com/the-biggest-employer-in-every-us-state-2017-11 (last visited March 28, 2018).

[3] According to CEC, the fee is $400.00 unless the suspect needs to spread the payments out of over time, in which case the fee goes to $500.00.

[4] The introduction of the "personal coach" into the commercial relationship being established here, without disclosing that by training and function within the organization he is communicating with the suspect *for purposes of collecting a debt*, raises a serious question of potential violations of the Uniform Consumer Credit Code, which requires strict compliance with its mandatory disclosures of the true purpose of such communications with debtors.

[5] Information provided by Walmart representative on August 14, 2017.

[6] Thus, the present circumstances are reminiscent of those in *Connally v. Georgia,* 429 U.S. 245 (1977), where a unanimous Supreme Court, writing *Per Curiam*, held that (1) a state's chief investigator and prosecutor (state attorney general) are not "neutral and detached," so any warrant issued by [them] is invalid, *citing Coolidge v. New Hampshire*, 403 U.S. 443 (1971), and (2) where the judicial officer issuing the warrant is compensated by receiving a fee for issuing the warrant, but receives no fee if he decides not to issue the warrant on any grounds, was not a "neutral and detached magistrate" within the meaning of the precedents under the Fourth Amendment's proscription against unreasonable searches and seizures because the person making the determination of probable cause had a *direct pecuniary interest in the outcome of his review.*

[7] In 2015, the San Francisco City attorney sued CEC for injunctive relief, equitable relief, and civil penalties for violations of California business law. On August 14, 2017, the Superior Court for San Francisco County held that CEC's diversion program constituted extortion under California state law. Following this injunctive order, CEC has ceased all operations in California.

[8] Please note that this opinion is strictly limited to the conduct and laws as they exist in Indiana. This opinion is not

intended as an analysis of federal law as it applies outside the State of Indiana.

[9] The San Francisco court cared little for CEC's argument that its program's benefits outweighed any claim of extortion: "CEC's arguments seeking to avoid condemnation of its diversion program as extortion lack merit. As noted, CEC's extolling of the virtues of its diversion program is irrelevant to whether the program constitutes extortion. After reciting some of the 'positive aims and impacts' of its program. . ., CEC argues that plaintiff 'seems only concerned with the fact that CEC charges a fee for its course and that the alternative is reporting the crime to the police. This does not constitute extortion.' Wrong."

[10] The forensic diversion program for qualified individuals is found at Indiana Code Section 11-12-3.7-11 and provides for a plea of guilty and the withholding of judgment of conviction pending completion of the program.

Posted: 06/06/2018 by Legislative Services Agency
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