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**CERTAIN LARCENIES FROM A
MERCHANT NOW A FELONY!
ORGANIZED RETAIL
THEFT PROHIBITED!!**

EFFECTIVE DECEMBER 1, 2007

**Senate Bill 1270:
An Act to Create the Criminal Offenses of**

**LARCENY FROM A MERCHANT
&
ORGANIZED RETAIL THEFT**

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THE RALPH PAGE

Ralph B. Strickland, Jr.

DECEMBER 1, 2007

**Except for my comments material herein is from Senate Bill 1270, Session Law 2007-373,
The 2007 Session of the North Carolina General Assembly**

Some Law:

Article 16 of Chapter 14 of the General Statutes is amended is by adding a new section to read:

GS 14-72.11. Larceny from a merchant.

A person is guilty of a Class H felony if the person commits larceny against a merchant under any of the following circumstances:

- (1) If the property taken has a value of more than two hundred dollars (\$200.00), by using an exit door erected and maintained to comply with the requirements of 29 C.F.R. § 1910 Subpart E, upon which door has been placed a notice, sign, or poster providing information about the felony offense and punishment provided under this subsection, to exit the premises of a store.
- (2) By removing, destroying, or deactivating a component of an antishoplifting or inventory control device to prevent the activation of any antishoplifting or inventory control device.

(3) By affixing a product code created for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price.

(4) When the property is infant formula valued in excess of one hundred dollars (\$100.00). As used in this subsection, the term "infant formula," has the same meaning as found in 21 U.S.C. § 321(z)."

GS 14-72.11 has four new felonies and I shall discuss them one at a time.

First felony: A person is guilty of a Class H felony if the person commits larceny against a merchant under any of the following circumstances:

(1) If the property taken has a value of more than two hundred dollars (\$200.00), by using an exit door erected and maintained to comply with the requirements of 29 C.F.R. § 1910 Subpart E, upon which door has been placed a notice, sign, or poster providing information about the felony offense and punishment provided under this subsection, to exit the premises of a store.

MY COMMENTS:

Element 1: A person must commit a larceny from a merchant; this is not a crime of larceny from a person, church, school, hospital, charitable institution (i.e. Catholic Social Ministries on Ft. Bragg Road, Fayetteville), etc. The statute does not define merchant so I will. A merchant is a person who buys and sells commodities for profit; a dealer; a trader; a storekeeper; a retailer.

Element 2: The criminal must take property valued at more than \$200; the thief must steal property worth at least \$200.01. The value of an item is its sticker price or the value the merchant places upon an item that bears no price tag.

Element 3: The criminal must exit a door of the establishment without paying for the item or items.

Element 4: The door itself must be erected and maintained to comply with 29 C.F.R. Section 1910, Subpart E. This citation is to the Code of Federal Regulations. Chapter 29 is entitled "Labor." Section 1910 is entitled "Occupational Safety and Health Standards." Subpart E is entitled "Means of Egress."

Therefore, the criminal must exit through a door designed, erected and established as an exit-way from the merchant's building, shop or store. I have included the federal standards for such a door in Appendix One. By all means read it; you and the District Attorney must prove to the jury that the door met all established regulations in Subpart E. If I were a defense attorney this regulation is where I would focus my attack - just read Appendix One and you will see why. It is going to be very difficult to prove the door meets all the standards in the Code of Federal Regulations.

Element 5: There must be a notice, sign or poster affixed to the door that gives notice of this felony and the punishment for it. Therefore, it is not a violation of this statute if a person leaves an anchor store (Macy's; JC Penny's, etc.) at Cross Creek Mall in Fayetteville with over \$200 of purloined items if they go through an open door into the mall itself. For this act to be a felony they must exit through a door with the notice attached. Think about it.

Please note that the statute says nothing about the size of the sign or its wording. To help merchants with whom you speak please see Appendix Two where I cover such issues. You may give any store owner a copy of this memo to help them understand and take advantage of this new law.

Second felony: A person is guilty of a Class H felony if the person commits larceny against a merchant under any of the following circumstances:

(2) By removing, destroying, or deactivating a component of an antishoplifting or inventory control device to prevent the activation of any antishoplifting or inventory control device.

MY COMMENTS:

Element 1: The item of merchandise in question must have previously attached thereto in some form an anti-shoplifting or inventory control device.

Element 2: A person must remove it; or destroy it; or deactivate it so that it will not work to sound an alarm nor will the device activate itself when passed through an inventory control monitor.

Note that item need not be taken through a door; the crime is committed when the person tampers with the anti-shoplifting or inventory control device and actually damages to the extent it will not work.

And I think that even if you charge a felony you must prove the tampered item in the possession of the criminal was tampered by him; just having it in his possession is not enough. Any of us could unknowingly pick up such a tampered product and present it for purchase and that should not make us a felon (nor will it.)

If you are going to charge this felony pass the item through a control device to check and see if the anti-shoplifting or inventory control device fails to activate; you must prove that beyond a reasonable doubt to a jury.

Third felony: A person is guilty of a Class H felony if the person commits larceny against a merchant under any of the following circumstances:

(3) By affixing a product code created for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price.

MY COMMENTS:

This one is easy. It is a felony for the criminal to affix to an item of merchandise a product code created solely to defraud the merchant by displaying a price less than the actual price the merchant has established for that merchandise.

Again, note that item need not be taken through a door; the crime is committed when the person tampers with the merchandise to change the price to a lower amount than the merchant previously established.

And again, I think that even if you charge a felony you must prove the tampered item in the possession of the criminal was tampered by him; just having it in his possession is not enough. Any of us could unknowingly pick up such a tampered product and present it for purchase and that should not make us a felon (nor will it.)

Note: § 14 72.1. Concealment of merchandise in mercantile establishments.

(d) Whoever, without authority, willfully transfers any price tag from goods or merchandise to other goods or merchandise having a higher selling price or marks said goods at a lower price or substitutes or superimposes thereon a false price tag and then presents said goods or merchandise for purchase shall be guilty of a misdemeanor ...

Nothing herein shall be construed to provide that the mere possession of goods or the production by shoppers of improperly priced merchandise for checkout shall constitute prima facie evidence of guilt.

MY COMMENTS:

This misdemeanor seems to pretty much say the same thing as the new felony, does it not? Even so, charge the felony when you can. If there is then a plea negotiation, the charge can then be reduced to this misdemeanor rather than being just dismissed.

Once more: I think that even if you charge a felony you must prove the tampered item in the possession of the criminal was tampered by him; just having it in his possession is not enough. Any of us could unknowingly pick up such a tampered product and present it for purchase and that should not make us a felon (nor will it.)

Fourth felony: A person is guilty of a Class H felony if the person commits larceny against a merchant under any of the following circumstances:

(4) When the property is infant formula valued in excess of one hundred dollars (\$100.00). As used in this subsection, the term "infant formula," has the same meaning as found in 21 U.S.C. § 321(z)."

MY COMMENTS:

Well, well, well. If the criminal steals, takes and carries away (through any exit door) infant formula in excess of \$100.00 he or she has committed a felony.

Note the federal definition referred to by the statute:

TITLE 21—FOOD AND DRUGS

CHAPTER 9—FEDERAL FOOD, DRUG, AND COSMETIC ACT

SUBCHAPTER II-DEFINITIONS

(z) The term "infant formula" means a food which purports to be or is represented for special dietary use solely as a food for infants by reason of its simulation of human milk or its suitability as a complete or partial substitute for human milk.

Now you know the full story.

I find this particular felony very interesting in that I had no idea that the larceny of formula was of such proportions in the Old North state as to rise to the need of making it a felony to steal \$100.01 or more of it. My, my, my.

There is a new fifth felony created in Senate Bill 1270 by amending GS 14-71, adding a subsection (b):

(b) If a person knowingly receives or possesses property in the custody of a law enforcement agency that was explicitly represented to the person by an agent of the law enforcement agency as stolen, the person is guilty of a Class H felony and may be indicted, tried and punished in any county in which the person received or possessed the property.

MY COMMENTS: As they say where I come from, this amendment is as easy as pie to understand. It authorizes law enforcement stings to enable us to arrest people who possess or fence perfectly legal personal property by allowing them to possess it or buy it from undercover deputies/officers who represent the property to be stolen. In a nutshell: we lie to them, they buy the lie, take the property and we arrest them for a felony. Cool. Way cool.

By the way, this has been done with counterfeit narcotics for years - NCGS§ 90 95. Violations; penalties.

- (a) Except as authorized by this Article, it is unlawful for any person:
 - (1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;
 - (2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;
 - (3) To possess a controlled substance.

Of course, here the bad guys lie to us and say that they are selling, say crack cocaine, when they are in fact selling us pieces of white caked soap (or pieces of a Brazil nut.) Now we turn the tables and tell them the property is stolen when it isn't and they purchase or simply take it into their possession and commit a felony by doing so. As my father said to me so long ago - "Life is tough, son, but next to impossible to survive if you are going to be stupid or criminal or, even worse, a stupid criminal."

This never ending memo trudges on (to walk especially laboriously or wearily):

There has also been created a new article in Chapter 14 of the NCGS by Senate Bill 1270, establishing *two more* new felonies:

Article 16A.

"Organized Retail Theft.

§ 14 86.5. Definitions.

The following definitions apply in this Article:

- (1) "Retail property." - Any new article, product, commodity, item, or component intended to be sold in retail commerce.
- (2) "Retail property fence." - A person or business that buys retail property knowing or believing that retail property is stolen.
- (3) "Theft." - To take possession of, carry away, transfer, or cause to be carried away the retail property of another with the intent to steal the retail property.
- (4) "Value." - The retail value of an item as advertised by the affected retail establishment, to include all applicable taxes.

"§ 14 86.6. Organized retail theft.

(a) A person is guilty of a Class H felony if the person:

- (1) Conspires with another person to commit theft of retail property from a retail establishment, with a value exceeding one thousand five hundred dollars (\$1,500) aggregated over a 90 day period, with the intent to sell that retail property for monetary or other gain, and who takes or causes that retail property to be placed in the control of a retail property fence or other person in exchange for consideration.
- (2) Receives or possesses any retail property that has been taken or stolen in violation of subdivision (1) of this subsection while knowing or having reasonable grounds to believe the property is stolen.

(b) Any interest a person has acquired or maintained in violation of this section shall be subject to forfeiture pursuant to the procedures for forfeiture set out in G.S. 18B 504."

MY COMMENTS:

As for the definitions, read them. (I went to law school three years just to be able to write the previous sentence.)

Crime 1: Conspiring to commit theft of retail property.

Element 1: A minimum of two persons must *conspire* to commit the felony of organized retail theft. To conspire means merely to agree with at least one other person secretly to do something illegal. Theft means to steal, take and carry away. Retail means to sell to another. Property means personal property such as goods for sell in a mercantile establishment.

Element 2: The two or more people must conspire to steal over \$1,500 of such retail property.

Element 3: This conspiracy must occur over a 90-day period; not 89 days but at least 90 days.

Element 4: The criminal parties must intend to sell their stolen goods to others; if they keep it for themselves, there is no crime.

Element 5: The bad guys must turn the property over to a “fence” or other person in exchange for consideration (money, other goods or services.)

Subparagraph (b) of GS 14-86.6 states: (b) Any interest a person has acquired or maintained in violation of this section shall be subject to forfeiture pursuant to the procedures for forfeiture set out in G.S. 18B 504.

I have included GS 18B-504 in Appendix Three. Read it. When you do you will note that it discusses the forfeiture of alcohol products. However, when you read it as it applies to organized retail theft you simply read it as it applies to stolen mercantile items and not to beer, wine or whisky. And there you are.

This will be a very difficult crime to prove beyond a reasonable doubt because of the number and complexity of the elements necessary to prove the crime.

Crime 2: Receiving or possessing retail property acquired or maintained as a result of a violation of conspiring to commit organized retail theft.

Here, stating the name of the crime lays out every element necessary for charge, indictment and conviction.

APPENDIX ONE

Sec. 1910.36 Design and construction requirements for exit routes.

(a) Basic requirements. Exit routes must meet the following design and construction requirements:

(1) An exit route must be permanent. Each exit route must be a permanent part of the workplace.

(2) An exit must be separated by fire resistant materials.

Construction materials used to separate an exit from other parts of the workplace must have a one-hour fire resistance-rating if the exit connects three or fewer stories and a two-hour fire resistance-rating if the exit connects four or more stories.

(3) Openings into an exit must be limited. An exit is permitted to have only those openings necessary to allow access to the exit from occupied areas of the workplace, or to the exit discharge. An opening into an exit must be protected by a self-closing fire door that remains closed or automatically closes in an emergency upon the sounding of a fire alarm or employee alarm system. Each fire door, including its frame and hardware, must be listed or approved by a nationally recognized testing laboratory. Section 1910.155(c)(3)(iv)(A) of this part defines “listed” and Sec. 1910.7 of this part defines a “nationally recognized testing laboratory.”

(b) The number of exit routes must be adequate--(1) Two exit routes. At least two exit routes must be available in a workplace to permit prompt evacuation of employees and other building occupants during an emergency, except as allowed in paragraph (b)(3) of this section. The exit routes must be located as far away as practical from each other so that if one exit route is blocked by fire or smoke, employees can evacuate using the second exit route.

(2) More than two exit routes. More than two exit routes must be available in a workplace if the number of employees, the size of the building, its occupancy, or the arrangement of the

workplace is such that all employees would not be able to evacuate safely during an emergency.

(3) A single exit route. A single exit route is permitted where the number of employees, the size of the building, its occupancy, or the arrangement of the workplace is such that all employees would be able to evacuate safely during an emergency.

Note to paragraph 1910.36(b): For assistance in determining the number of exit routes necessary for your workplace, consult NFPA 101-2000, Life Safety Code.

(c) Exit discharge. (1) Each exit discharge must lead directly outside or to a street, walkway, refuge area, public way, or open space with access to the outside.

(2) The street, walkway, refuge area, public way, or open space to which an exit discharge leads must be large enough to accommodate the building occupants likely to use the exit route.

(3) Exit stairs that continue beyond the level on which the exit discharge is located must be interrupted at that level by doors, partitions, or other effective means that clearly indicate the direction of travel leading to the exit discharge.

(d) An exit door must be unlocked. (1) Employees must be able to open an exit route door from the inside at all times without keys, tools, or special knowledge. A device such as a panic bar that locks only from the outside is permitted on exit discharge doors.

(2) Exit route doors must be free of any device or alarm that could restrict emergency use of the exit route if the device or alarm fails.

(3) An exit route door may be locked from the inside only in mental, penal, or correctional facilities and then only if supervisory personnel are continuously on duty and the employer has a plan to remove occupants from the facility during an emergency.

(e) A side-hinged exit door must be used. (1) A side-hinged door must be used to connect any room to an exit route.

(2) The door that connects any room to an exit route must swing out in the direction of exit travel if the room is designed to be occupied by more than 50 people or if the room is a high hazard area (i.e., contains contents that are likely to burn with extreme rapidity or explode).

(f) The capacity of an exit route must be adequate. (1) Exit routes must support the maximum permitted occupant load for each floor served.

(2) The capacity of an exit route may not decrease in the direction of exit route travel to the exit discharge.

Note to paragraph 1910.36(f): Information regarding "Occupant load" is located in NFPA 101-2000, Life Safety Code.

(g) An exit route must meet minimum height and width requirements.

(1) The ceiling of an exit route must be at least seven feet six inches (2.3 m) high. Any projection from the ceiling must not reach a point less than six feet eight inches (2.0 m) from the floor.

(2) An exit access must be at least 28 inches (71.1 cm) wide at all points. Where there is only one exit access leading to an exit or exit discharge, the width of the exit and exit discharge must be at least equal to the width of the exit access.

(3) The width of an exit route must be sufficient to accommodate the maximum permitted occupant load of each floor served by the exit route.

(4) Objects that project into the exit route must not reduce the width of the exit route to less than the minimum width requirements for exit routes.

(h) An outdoor exit route is permitted. Each outdoor exit route must meet the minimum height and width requirements for indoor exit routes and must also meet the following requirements:

(1) The outdoor exit route must have guardrails to protect unenclosed sides if a fall hazard exists;

(2) The outdoor exit route must be covered if snow or ice is likely to accumulate along the route, unless the employer can demonstrate that any snow or ice accumulation will be removed before it presents a slipping hazard;

(3) The outdoor exit route must be reasonably straight and have smooth, solid, substantially level walkways; and

(4) The outdoor exit route must not have a dead-end that is longer than 20 feet (6.2 m).

[67 FR 67961, Nov. 7, 2002]

APPENDIX TWO

MY COMMENTS:

Let's discuss signage, shall we? The statute, GS 14-72.11, requires that a sign be placed on the door that the felonious criminal thief is exiting.

How big should that sign be? A minimum of 120 square inches; 10X12 inches should do it.

Why 120 square inches? NCGS 14-159.7 requires that when a person wishes to "post" his property to prohibit trespassers on that property that the person posts the property with signs no smaller than 120 square inches and that those signs be no further apart than 200 yards.

Therefore, if a sign 120 square inches in size every 200 yards is sufficient to post a property then a sign of that size is more than sufficient in size to warn a thief who is actually touching the door on which it is posted as he escapes with stolen merchandise in his sweaty but recently felonious palms.

Should there be a second, separate sign in Spanish? Si! But let's go the English route first.

The sign should be *white* with the following word in *uppercase* letters in *red*:

WARNING!

In black and with appropriate case and grammar the following should appear:

The larceny of merchandise through this door subjects a thief to charges of the felonious crime of larceny from a merchant, a Class H felony in North Carolina.

**North Carolina General Statutes
Chapter 14
Section 72.11
Larceny from a merchant
(GS 14-72.11)**

How do I know what colors and language should be used? Simple - I am a former assistant district attorney and Special Deputy Attorney General for the State of North Carolina: Believe me, I just *know*.

Spanish translation:

¡Advertencia!

El latrocinio de mercancías por esta puerta sujeta al ladrón a cargas del crimen criminal de latrocinio de un mercader, un crimen grave de la Clase H en Carolina del norte.

**Carolina del norte
el Capítulo 14
General de Estatutos**

**Sección 72,11
Latrocinio de un mercader
(NCGS-14-72.11)**

APPENDIX THREE

§ 18B 504. Forfeiture.

- (a) Property Subject to Forfeiture. - The following kinds of property shall be subject to forfeiture:
- (1) Motor vehicles, boats, airplanes, and all other conveyances used to transport nontaxpaid alcoholic beverages in violation of the ABC laws;
 - (2) Containers for alcoholic beverages which are manufactured, possessed, sold, or transported in violation of the ABC laws; and
 - (3) Equipment or ingredients used in the manufacture of alcoholic beverages in violation of the ABC laws.
- (b) Exemption for Forfeiture. - Property which may be possessed lawfully shall not be subject to forfeiture when it was used unlawfully by someone other than the owner of the property and the owner did not consent to the unlawful use.
- (c) Seizure of Property. - If property subject to forfeiture has not already been seized as part of an arrest or search, a law enforcement officer may apply to a judge for an order authorizing seizure of that property. An order for seizure may be issued only after criminal process has been issued for an ABC law violation in connection with that property. The order shall describe the property to be seized and shall state the facts establishing probable cause to believe that the property is subject to forfeiture.
- (d) Custody until Trial. - A law enforcement officer seizing property subject to forfeiture shall provide for its safe storage until trial. The officer may destroy stills and perishable materials seized under subdivision (a)(3), if storage is impractical and if the absence of the property will not be likely to adversely affect the defendant's right to defend against the charge that is the basis for the forfeiture. If the officer having custody of the property is satisfied that it will be returned at the time of trial, he may return the property to the owner upon receiving a bond for the value of the property, signed by sufficient sureties. If the property is not returned at the time of trial, the full amount of the bond shall be forfeited to the court. Property which it is unlawful to possess may not be returned to the owner.

- (e) Disposition after Trial. - The presiding judge in a criminal proceeding for violation of ABC laws may take the following actions after resolution of a charge against the owner or possessor of property subject to forfeiture under this section:
- (1) If the owner or possessor of the property is found guilty of an ABC offense, the judge may order the property forfeited.
 - (2) If the owner or possessor of the property is found not guilty, or if the charge is dismissed or otherwise resolved in favor of the owner or possessor, the judge shall order the property returned to the owner or possessor.
 - (3) If ownership of the property remains uncertain after trial, the judge may order the property held for a specified time to determine ownership. If the judge finds that ownership cannot be determined with reasonable effort, the judge shall order the property forfeited.
 - (4) Regardless of the disposition of the charge, if the property is something that may not be possessed lawfully, the judge shall order it forfeited.
 - (5) If the property is also needed as evidence at an administrative hearing, the judge shall provide that the order does not go into effect until the Commission determines that the property is no longer needed for the administrative proceeding.
- (f) Disposition of Forfeited Property. - A judge ordering forfeiture of property may order any one of the following dispositions:
- (1) Sale at public auction;
 - (2) Sale at auction after notice to certain named individuals or groups, if only a limited number of people would have use for that property;
 - (3) Delivery to a named State or local law enforcement agency, if the property is not suited for sale, with preference to be given in the following order, to: the agency that seized the property, the ALE Division, the Commission, the local board of the jurisdiction in which the property was seized, and the Department of Justice; or
 - (4) Destruction, if possession of the property would be unlawful and it could not be used or is not wanted for law enforcement, or if sale or other disposition is not practical.
- (g) Proceeds of Sale. - If forfeited property is sold, the proceeds of that sale shall be paid to the school fund of the county in which the property was seized, except as provided in subsection (h). Before placing the proceeds in the school fund the agency making the sale may deduct and retain the costs of storing the property and conducting the sale.
- (h) Innocent Parties. - At any time before forfeiture is ordered, an owner of seized property or a holder of a security interest in seized property, other than the defendant, may apply to protect his interest in the property. The application may be made to any judge who has jurisdiction to try the offense with which the property is associated. If the judge finds that the property owner or holder of a security interest did not consent to the unlawful use of the property, and that the property may be possessed lawfully by the owner or holder, the judge may order:
- (1) That the property be returned to the owner, if it is not needed as evidence at trial;
 - (2) That the property be returned to the owner following trial or other resolution of the case; or
 - (3) That, if the property is sold following trial, a specified sum be paid from the proceeds of that sale to the holder of the security interest.
- (i) Defendant Unavailable. - When property is seized for forfeiture, but the owner is unknown, the district attorney may seek forfeiture under this section by an action in rem against the property. If the owner is known and has been charged with an offense, but is unavailable for trial, the district attorney may seek forfeiture either by an action in rem against the property or by motion in the criminal action.

(j) When No Charge is Made. - Any owner of property seized for forfeiture may apply to a judge to have the property returned to him if no criminal charge has been made in connection with that property within a reasonable time after seizure. The judge may not order the return of the property if possession by the owner would be unlawful. (1923, c. 1, s. 6; C.S., s. 3411(f); 1927, c. 18; 1945, c. 635; 1951, c. 850; 1955, c. 560; 1957, c. 1235, s. 1; 1969, c. 789; 1971, c. 872, s. 1; 1977, c. 854, s. 2; 1981, c. 412, s. 2; c. 747, s. 48; 1993, c. 415, s. 6.)

**For those of you who read this far.
Merry Christmas and Happy New Year!
And the secret word of the day is love.
Pass it on.
RBSjr**