OCDLA
OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

Legislative Testimony

Oregon Criminal Defense Lawyers Association

March 1, 2017

The Honorable Jeff Barker, Chair
House Judiciary Committee, Members

RE: House Bill 2615 – testimony in support

Dear Chair Barker and Members,

The Oregon Criminal Defense Lawyers Association is an organization of attorneys who represent individuals in juvenile dependency and juvenile delinquency proceedings, adult criminal prosecutions and appeals, civil commitment and post-conviction relief proceedings throughout the state of Oregon. Thank you for the opportunity to submit the following comments in support of HB 2615.

Why HB 2615 is necessary: HB 2615 addresses a charging practice by which persons who commit non-violent theft of items of minimal value are exposed to, and often are sentenced to prison.

Under current theft statutes, district attorneys frequently prosecute the attempted theft of items of minimal value as a Class C felony under a theory unique to "return fraud." "Return fraud" is a term of art not codified in law. It refers to a manner of shoplifting whereby a person takes an item off a merchant's shelf and, rather than exiting the store with the item, instead submits it to the return counter for either cash or credit, usually accompanied with assurances that the item previously was purchased but the individual had lost the receipt.

District attorneys prosecute instances of "return fraud" as Class C felonies under the Theft by Receiving theory in Oregon's theft statute, even for items of minimal value. HB 2615 asks the Legislature to decide whether it approves of this use of the Theft by Receiving statute, or whether "return fraud" ought to be prosecuted under other sections of Oregon's theft statutes which distinguish felony theft from misdemeanor theft based on the dollar value of the item taken.

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Oregon's theft statutes and crime seriousness levels: Oregon has many theft statutes allowing for different theories of theft and for theft of special items such as metal. In all but a few instances, the crime seriousness level is determined by the dollar value of the property. When discussing theft of merchandise, property of less than $100 is a Class C misdemeanor [ORS 164.043]; property between $100 and $1000 is a Class A misdemeanor [ORS 164.045]; property over $1000 is a Class C felony [ORS 164.055]

Two exceptions are always felonies, regardless of value: Two theories of committing theft are always felonies, regardless of value of the merchandise:

- **Theft by Extortion [ORS 164.075].** In every instance of Theft by Extortion, it is a Class B felony regardless of value. This makes sense. Employing intimidation, threat or fear to obtain property is inherently more ominous, more dangerous and more culpable than merely taking or appropriating property.

- **Theft by Receiving [ORS 164.095].** In every instance of Theft by Receiving, it is a Class C felony regardless of value. Felony status is appropriate because, by *knowingly* taking or selling stolen property, the person is commercializing theft and poses a greater public nuisance than the common shoplifter who appropriates property for themselves. This provision, adopted from the 1971 Model Penal Code, seeks to punish the "fence" who knowingly buys and sells stolen goods, thereby incentivizing further shoplifts.

Appellate case law addressing "return fraud" as Theft by Receiving: For a long time, "return fraud" was charged under the generic theory of Theft by Taking which, as noted, was tethered to the dollar value of the merchandise. The case of *State v. Rocha*, 233 Or.App. 1 (2009) changed that. In *Rocha*, an alert and zealous deputy district attorney realized it might be possible to prosecute a "return fraud" case under the theory of Theft by Receiving based on the argument that the defendant "stole" the merchandise at the time she removed it from the shelf with no intent of paying for it such that when she walked down the aisle and presented the merchandise to the return counter for cash or value, she "sold" the merchandise she had just stolen two minutes prior. The Court of Appeals analyzed its prior opinions and agreed it would be possible to sustain a prosecution under that theory. Since the *Rocha* decision, almost all instances of "return fraud" have been prosecuted as Class C felonies.

It should be noted here that if the defendant actually left the store without paying for the item, the government could not use the Theft by Receiving theory. Rather, the appropriate charge would be Theft by Taking which, as stated above, is tethered to the dollar value of the merchandise.

"Return fraud" merchandise is almost always less than felony level: In the majority of instances of "return fraud" the value is less than $100, making these Class C misdemeanor level. In one known instance, a defendant was charged with a Class C felony for seeking the return of an item less than $5.

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The impact of charging "return fraud" as Class C felonies: Charging these instances of "return fraud" as Class C felonies has immediate and collateral consequences. The immediate impact is the cost of prosecution (they must be initiated by a grand jury) and increased cost of defense, the felonization of the individual, and state funding for incarceration and supervision. The largest impact has been felt since the advent of Ballot Measure 57. Should the defendant have two prior misdemeanor crimes, she is subject to BM 57 mandatory sentencing. Even if placed on supervision (often a "strict compliance" probation), if probation is ultimately revoked the offender will go to prison for the non-violent taking of property of minimal value.

The "fix" in HB 2615: The Legislature has never spoken to whether it endorses the use of the Theft by Receiving statute for "return fraud" prosecutions. HB 2615 squarely presents the question to the Legislature: does it endorse this use of the Theft by Receiving statute?

If the answer is no, then the fix is relatively simple. HB 2615 clarifies that the crime of Theft by Receiving in ORS 164.095 does not apply to the return of merchandise taken from a mercantile establishment. By removing this theory of prosecution from Theft by Receiving, it leaves available to the prosecution the theories of Theft by Taking [ORS 164.015] and Theft by Deception [ORS 164.085], both of which are tethered to the dollar value of the merchandise.

Thank you for your consideration of these comments. We are happy to address any questions or comments.

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