METROPOLITAN PUBLIC DEFENDER
MULTNOMAH COUNTY SECTION

February 28, 2017

The Honorable Jeff Barker, Chair
House Judiciary Committee, Members

RE: House Bill 2615 – testimony in support

Dear Chair Barker and Members,

My name is Bryan Francesconi and I am currently the supervisor of the misdemeanor unit at the Metropolitan Public Defenders office. As a public defender for over ten years, I have cultivated little corners of expertise and legal obsessions I care about disproportionately to my peers. *Rocha* thefts are one of those topics for me.

In fact, I can approximately tell you the day it happened: August 9th, 2010. I was a staff attorney in our drug and property unit back then when I met Ted. Ted was charged with Theft I. What did Ted do to get charged with that crime? He walked into Fred Meyer, walked over to the electronic section, and picked up a pair of headphones and some batteries worth a grand total of $20.78. He then took an old receipt out of his pocket, walked up to the counter, and attempted to sell the items back. All of it was caught on video, of course.

You know what he was originally arrested for? Theft III.

You know what the offer on the case was by the time the deputy district attorney was done? Thirteen months prison.

As a new attorney to our property unit, I was outraged. Thirteen months prison over $20? That cannot be right?! I filed motion after motion after motion. I went to trial and I argued until I was blue in the face.

And I lost.

But Ted didn't go to prison. You know why? Ballot Measure 57 didn't exist yet. Back in 2010, old REPO allowed judges to downward depart to probation. So Ted lost and Ted got a thirteen month suspended sentence.

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In anticipation for BH 2615, I looked up Ted's case after all these years. Ted got revoked in 2012 and served every day, minus credits, of that 13 month sentence. *Over $20.78.*

Today, he would serve thirty months up front under Ballot Measure 57.

Anecdotal you say. That is just one case by me – my horror story.

An attorney with our office had a case on the docket today, March 1, 2017, at 1:30 pm where a client was charged with Theft I by selling for using an old receipt in an attempt to return a new saw and electronic lock to Home Depot. The total value of those items was $208.00. That client got his case dismissed yesterday for lack of evidence, but only after demonstrating his willingness to risk a felony by going to trial. Once the case deputy realized the defendant wasn't going to just take his misdemeanor offer, he dismissed the case.

Far more egregiously, last week, an attorney with our office pled out a female client to her first felony conviction, a Theft 1 return fraud case involving $11.78 worth of returned items.

That attorney thinks his lowest value felony conviction was for $4.95.

On February 10th, 2017, we had a client charged with Theft I for walking into Fred Meyers, grabbing a $19.00 bottle of wine, pulling an old receipt out of his pocket, and attempting to return it. <u>He resolved his case for a 28 month suspended sentence.</u>

And that was all in the last two weeks. Unfortunately, we couldn't really remember back farther than that because, honestly, we are used to this now. It starts out as rage inducing. It eventually becomes depressingly routine.

But there are the special cases we sometimes still can remember.

About a year ago, we had a case charged as a Theft I by selling for .....$2.10 in returned cat food. I'll be honest, I don't know if that person took a suspended sentence as we couldn't remember her name anymore.

We somewhat recently represented a grandmother with zero criminal history. She helped her daughter by taking care of her grandson during the week. Her grandson had a terrible cold and she realized she did not have the money to get him cough syrup. She did a *Rocha* return for $3.99 in cat food to make up the difference to be able to purchase the cough syrup for her sick grandson. She was charged with Theft I. The poor woman was mortified by her actions. *If she had just stolen the cough syrup, her case would have been dismissible in community court and she still would have learned the exact same lesson.*

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I understand that opposition to this bill primarily involves concerns over sophisticated shoplifting and fencing operations. I spent two years as a trial attorney in our property unit. I spent another year as the supervisor of that unit before my current assignment. All we do in that unit is property and drug offenses. *I do not believe I have ever seen a Rocha case involving a professional fence.* They may exist; it may happen. Maybe it even happens with some frequency outside of Multnomah County. However, I do not believe I have even seen nor even heard of it. And neither have the attorneys in my office. I asked around and none of my co-workers responded they had either.

The typical *Rocha* case usually involves old receipts of actually purchased items. They usually are for less than $30. They are almost always sad and obvious crimes involving small amounts of money by people whom are desperate.

Respectfully, in my opinion, there is a reason we don't see professional fences charged with *Rocha* thefts: *they are charged with theft I with aggregated values over the felony threshold*. This makes sense for a couple of reasons. First, the state cannot get full restitution for a *Rocha* theft if the underlying concern is over far larger amounts of money. Second, for non-mandatory minimum cases, the State's chances of getting up front prison on a *Rocha* theft would be substantially less than on an aggregated value theft case. In other words, if a person really is a professional fence, the state should be charging them with the perfectly appropriate crime already at their disposal – theft or aggravated theft based on aggregated values.

I work and live in a system dedicated to finding out the truth. Using all of our rules and all of our high minded concepts to figure out what actually happened on a specific date at a specific time. And as I often tell my clients, I believe those tools and rules usually work. The truth has a way of bubbling out during trials.

However, those concepts and efforts are towards an accurate accounting of the truth – *at trial.*

In pretrial negotiations, leverage is king and queen. A person charged with a ninety month case with threats of upward departures pleads out to a ninety months – why? Leverage.

A person charged with a seventy month case pleads out to a fifty month case – why? Leverage.

A person charged with a twenty month case pleads to a suspended sentence for twenty-five months – why? Leverage.

A person charged with a felony pleads to a misdemeanor with crazy probation terms– you get the idea.

By felonizing misdemeanor conduct and then coupling it with Ballot Measure 57, *Rocha* thefts give the State enormous leverage over very small value property crimes.

That is forcing our clients to plead out to 28 month suspended sentences on $19.00 bottles of wine.

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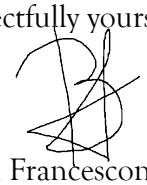
And we are all going to be worse off if that man fails on probation and we have to pay to house and feed him for twenty eight months over his desire for an ill begotten drink.

Respectfully yours,



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