METROPOLITAN PUBLIC DEFENDER
MULTNOMAH COUNTY SECTION

March 1, 2017

The Honorable Jeff Barker, Chair
House Judiciary Committee, Members

RE: House Bill 2615 – testimony in support

Dear Chair Barker and Members,

I have been a criminal defense attorney in Portland for 16 years. I have seen many people beset by drug addiction, mental illness, family dysfunction and poverty have their troubles compounded by draconian criminal laws. The return-fraud theft law, as applied by Oregon prosecutors, leads to some of the worst results.

Criminal laws should bring results that are simply and obviously reasonable. Anything else is an embarrassment to the people of our state. The first problem with return-fraud thefts being charged as felony theft by receiving is that it is a surprising and counter-intuitive result. My clients are not legal scholars. Most people are not legal scholars. Without studying the vagaries of the law, we get the sense that crimes causing more damage should and do result in more punishment. For most theft offenses, the punishment is keyed to the value stolen. In the case of stolen guns and stolen companion animals, the increased punishment matches the danger and outrage of these kinds of thefts. For return-fraud thefts, the results are almost always shocking to the non-lawyer. When someone goes to prison for stealing the price of a large smoothie, that is shocking and unexpected to most people.

A felony conviction and prison is an unexpected result even for someone to cracks open and reads Oregon's criminal laws. Return fraud being charged as felony theft by receiving, though endorsed by the Court of Appeals in 2009, requires a convoluted interpretation of Oregon's theft laws that makes it hard to see this result from just reading Oregon's criminal code. The commentaries and legislative history to the 1971 revisions make clear that the theft-by-selling provisions were drafted with the aim of punishing the professional fences who enable small-time thieves by creating a market for stolen goods. *See State v.Dechand*, 13 Or App 530, 535 (1973) (quoting Minutes of Senate Criminal Law & Procedure Committee, March 5, 1971, p 11). The application of felony theft by receiving to return frauds was approved by the Court of Appeals in *State v. Rocha*, 233 Or App 1 (2009). (This is why I call these thefts *Rocha* thefts.)

With this harsh and unexpected punishment in their toolkit, the prosecutors gain unfair control of a criminal case. In Multnomah County, it is routine that prosecutors threaten the harshest of results if a return-fraud defendant goes to trial, and then agree to a concession of some sort in return for a guilty plea. People with little or no criminal history have to agree to a misdemeanor conviction, or risk a felony conviction. People with some criminal history have to agree to a felony conviction, but get probation instead of prison under Ballot Measure 57. If you have enough criminal history to be mandatory prison under Ballot Measure 57, you have to fight to get either a long probation term or a shortened prison sentence. In all these cases, trial is not a real option, no matter what defects there may be in the state's case, and no matter how sympathetic the defendant's situation may be. The prosecutor is in the driver's seat. The judge is irrelevant. The jury is never called.

In conjunction with Measure 57, *Rocha* theft can result in a prison sentence remarkably quickly. If you have two prior convictions for theft in the second degree (which is a common result from a shoplifting), you face a presumptive 18 months in prison under Measure 57 for a *Rocha* theft, no matter how small the amount stolen. If you are a 20-year-old who once took a joyride in grandma's Miata, you may be on probation for Unauthorized Use of a Vehicle. Then, if you grab a $5 pack of batteries off the shelf at Walmart and return it for cash, you are facing not only 18 months in prison, but a mandatory 18 months in prison. Your only hope is to convince the prosecutor to give you a little mercy, because under Measure 57, the judge has no authority to give you a different sentence. We have not just harsh results, but an inflexible sentencing scheme that puts the prosecutor in the position of judge and jury.

Looking at my own cases, I found 29 examples that I had flagged as *Rocha* thefts between 2010 and 2016. (During part of that time, I was handling only Measure 11 cases.) A quick tally shows me that the median loss in these cases charged as felonies was $43. The average was $100. The most amazing examples include a drug addicted woman who stole $6. She had enough criminal history that she agreed to a plea bargain for probation and a felony conviction. Unfortunately, she failed at probation and ended up getting 18 months in prison. For a $6 theft.

I found the case of a man with some drug abuse history who stole $7. He got a misdemeanor conviction. If he had stolen the $7 in merchandise itself, he could have gone through community court, our restorative justice program, and gotten his case dismissed or reduced to a non-criminal violation in exchange for community service.

A drug addicted man who said he needed money for food stole $11, got felony probation, failed at probation, and did 6 months in jail. He should have just stolen the food.

Another man with a long drug history stole $50 by return fraud, got probation under Measure 57, and ended up doing 30 months in prison when he failed on probation. He was housed and fed and watched using our tax dollars for a 30 month sentence, over a $50 theft.

For those people who do more damage, for prolific, organized, professional shoplifters, the law operates in a simple and unremarkable way. If you steal $1000 or more, you are facing a felony,

and that just makes sense. The law should make sense. Going to prison for stealing $6 makes no sense at all.

Sincerely,

Michael A. Rees
Attorney