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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

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**Bill No:** AB 2294                      **Hearing Date:** June 21, 2022  
**Author:** Jones-Sawyer  
**Version:** April 18, 2022  
**Urgency:** Yes                                      **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Diversion for repeat retail theft crimes*

## HISTORY

Source: Author

Prior Legislation: AB 331 (Jones-Sawyer), Ch. 113, Stats. 2021  
AB 94 (Comm. on Budget and Fiscal Rev.), Ch. 25, Stats. 2019  
AB 1065 (Jones-Sawyer), Ch. 803, Stats. 2018  
AB 392 (Lackey), failed Assem. Public Safety, 2017  
SB 284 (Nguyen), failed Sen. Public Safety, 2017  
AB 208 (Eggman), Ch. 778, Stats. 2017  
AB 1351 (Eggman), vetoed, 2015  
SB 1369 (Kopp), Ch. 1132, Stats. 1996

Support: Peace Officers Research Association of California

Opposition: None known

Assembly Floor Vote: 54 - 15

## PURPOSE

***The purpose of this bill is to authorize a city attorney, district attorney, or county probation department to create a diversion or deferred entry of judgment program for individuals committing a theft offense or repeat theft offenses, as specified.***

*Existing law* states that every person who steals, takes, carries, leads, or drives away the personal property of another, or who fraudulently appropriates property which has been entrusted to them, or who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money, labor or real or personal property, is guilty of theft. (Pen. Code, § 484, subd. (a).)

*Existing law* divides theft into two degrees, petty theft and grand theft. (Pen. Code, § 486.)

*Existing law* defines grand theft as when the money, labor, or real or personal property taken is of a value exceeding \$950 dollars, except as specified; other cases of theft are petty theft. (Pen. Code, §§ 487-488.)

*Existing law* punishes grand theft as an alternate felony-misdemeanor (“wobbler”). (Pen. Code, § 487.)

*Existing law* punishes petty theft as a misdemeanor. (Pen. Code, § 490.)

*Existing law, until January 1, 2026*, creates the crime of organized retail theft which is defined as:

- Acting in concert with one or more persons to steal merchandise from one or more merchant’s premises or online marketplace with the intent to sell, exchange, or return the merchandise for value;
- Acting in concert with two or more persons to receive, purchase, or possess merchandise knowing or believing it to have been stolen;
- Acting as the agent of another individual or group of individuals to steal merchandise from one or more merchant’s premises or online marketplaces as part of a plan to commit theft; or,
- Recruiting, coordinating, organizing, supervising, directing, managing, or financing another to undertake acts of theft. (Pen. Code, § 490.4, subd. (a).)

*Existing law, until January 1, 2026*, punishes organized theft as follows:

- If violations of the provisions directed at acting in concert or as an agent are committed on two or more separate occasions within a one-year period, and if the aggregated value of the merchandise stolen, received, purchased, or possessed within that period exceeds \$950, the offense is punishable as a wobbler;
- Any other violation of the provisions directed at acting in concert or as an agent is punishable as a misdemeanor by imprisonment in a county jail not exceeding one year; and,
- A violation of the recruiting, coordinating, organizing, supervising, directing, managing, or financing provision is punishable as a wobbler. (Pen. Code, § 490.4, subd. (b).)

*Existing law, until January 1, 2026*, requires the Department of the California Highway Patrol (CHP) to coordinate with the Department of Justice (DOJ) to convene a regional property crimes task force to identify geographic areas experiencing increased levels of property crimes and assist local law enforcement with resources, such as personnel and equipment. (Pen. Code, § 13899.)

*Existing law, until January 1, 2026*, states that the task force shall provide local law enforcement in the identified region with logistical support and other law enforcement resources, including, but not limited to, personnel and equipment, as determined to be appropriate by the Commissioner of CHP in consultation with task force members. (Pen. Code, § 13899.)

*Existing law* requires a peace officer to release persons arrested for misdemeanors with a written notice to appear in court, containing the name and address of the person, the offense charged,

and the time when, and place where, the person shall appear in court, except in specified circumstances. (Pen. Code, § 853.6.)

*Existing law* specifies that if the following reasons exist a peace officer may choose to take into custody a person charged with a misdemeanor upon a written notice to appear in court:

- The person arrested was so intoxicated that he or she could have been a danger to himself or herself or to others;
- The person arrested required medical examination or medical care or was otherwise unable to care for his or her own safety;
- The person was arrested for a Vehicle Code violation and the person fails to present identification, refuses to give his or her promise to appear in court, or demands and immediate appearance before a magistrate;
- There were one or more outstanding arrest warrants for the person;
- The person could not provide satisfactory evidence of personal identification;
- The prosecution of the offense or offenses for which the person was arrested, or the prosecution of any other offense or offenses, would be jeopardized by immediate release of the person arrested;
- There was a reasonable likelihood that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested;
- The person arrested demanded to be taken before a magistrate or refused to sign the notice to appear;
- There is reason to believe that the person would not appear at the time and place specified in the notice and the basis for this determination is specifically stated; or,
- The person is arrested for certain violent crimes requiring a hearing in open court before release. (Pen. Code, § 853.6, subd. (a)(2).)

*This bill* includes within the reasons for nonrelease that the person has been cited, arrested, or convicted for misdemeanor or felony theft from a store in the previous 6 months and that there is probable cause to believe that the person arrested is guilty of committing organized retail theft.

*Existing law* authorizes a court to issue a bench warrant whenever a defendant fails to appear in court as required by law, and as specified. (Pen. Code, § 978.5.)

*This bill* authorizes the court to issue a bench warrant when the defendant has failed to appear and the defendant has been cited or arrested for misdemeanor or felony theft from a store and has failed to appear in court in connection with that charge or those charges in the previous 6 months.

*Existing law* states that pretrial diversion refers to the procedure of postponing prosecution of an offense filed as a misdemeanor either temporarily or permanently at any point in the judicial process from the point at which the accused is charged until adjudication. (Pen. Code, § 1001.1.)

*Existing law* authorizes the prosecution to approve a pretrial diversion program for misdemeanor offenses. (Pen. Code, §§ 1001.2, subd. (b) & 1001.50, subd. (b).)

*Existing law* provides that to be eligible for a prosecution-approved misdemeanor diversion program, all of the following must apply to the defendant:

- The defendant has not ever had probation or parole revoked without thereafter being completed;
- The defendant has not participated in a diversion program within the previous five years; and,
- The defendant has never been convicted of a felony, and has not been convicted of a misdemeanor within the previous five years. (Pen. Code, § 1001.51, subd. (a).)

*Existing law* authorizes a superior court judge to offer pretrial diversion to a person charged with a misdemeanor, over the objection of a prosecuting attorney (court-initiated misdemeanor diversion), except that a defendant may not be offered diversion for any of the following currently charged offenses:

- Any offense for which a person would be required to register as a sex offender;
- A domestic violence or domestic battery offense; and,
- Stalking. (Pen. Code, § 1001.95, subds. (a) & (e).)

*Existing law* states that if the defendant has complied with the imposed terms and conditions, at the end of the diversion period, the judge shall dismiss the action against the defendant. (Pen. Code, § 1001.95, subd. (c).)

*Existing law* authorizes pretrial diversion for particular groups of individuals, including members of the military and veterans (Pen. Code, § 1001.80); persons with mental disorders (Pen. Code, § 1001.36); and primary caregivers (Pen. Code, § 1001.83).

*This bill* authorizes a city or county prosecuting authority or county probation department to create a diversion or deferred entry of judgment program for persons who commit a theft offense or repeat theft offenses.

*This bill* defines “repeat theft offenses” to mean being cited or convicted for misdemeanor or felony theft from a store or from a vehicle two or more times in the previous 12 months and failing to appear in court when cited for these crimes or continuing to engage in these crimes after release or after conviction.

*This bill* provides that if a county creates a diversion or deferred entry of judgment program for individuals committing a theft offense or repeat theft offenses, on receipt of a case or at arraignment, the prosecuting attorney shall either refer the case to the county probation

department to conduct a prefiling investigation report to assess the appropriateness of program placement or, if the prosecuting attorney's office operates the program, determine if the case is one that is appropriate to be referred to the program.

*This bill* states that in determining whether to refer a case to the program, the probation department or prosecuting attorney shall consider, but is not limited to, all of the following factors:

- Any prefiling investigation report conducted by the county probation department or nonprofit contract agency operating the program that evaluates the individual's risk and needs and the appropriateness of program placement.
- If the person demonstrates a willingness to engage in community service, restitution, or other mechanisms to repair the harm caused by the criminal activity and address the underlying drivers of the criminal activity.
- If a risk and needs assessment identifies underlying substance abuse or mental health needs or other drivers of criminal activity that can be addressed through the diversion or deferred entry of judgment program.
- If the person has a violent or serious prior criminal record or has previously been referred to a diversion program and failed that program.
- Any relevant information concerning the efficacy of the program in reducing the likelihood of participants committing future offenses

*This bill* states that on referral of a case to the program, a notice shall be provided, or forwarded by mail, to the person alleged to have committed the offense with both of the following information:

- The date by which the person must contact the diversion program or deferred entry of judgment program in the manner designated by the supervising agency; and,
- A statement of the penalty for the offense or offenses with which that person has been charged.

*This bill* specifies that the prosecuting attorney may enter into a written agreement with the person to refrain from, or defer, prosecution on the offense or offenses on the following conditions:

- Completion of the program requirements such as community service or courses reasonably required by the prosecuting attorney.
- Making adequate restitution or an appropriate substitute for restitution to the establishment or person from which property was stolen at the face value of the stolen property, if required by the program.

*Existing law* establishes the Board of State and Community Corrections (BSCC). (Pen. Code, § 6024, subd. (a).)

*Existing law* requires the BSCC to do the following, among other things:

- Develop recommendations for the improvement of criminal justice and delinquency and gang prevention activity throughout the state;
- Identify, promote, and provide technical assistance relating to evidence-based programs, practices, and promising and innovative projects consistent with the mission of the board;
- Receive and disburse federal funds, and perform all necessary and appropriate services in the performance of its duties as established by federal acts;
- Develop procedures to ensure that applications for grants are processed fairly, efficiently, and in a manner consistent with the mission of the board;
- Identify delinquency and gang intervention and prevention grants that have the same or similar program purpose, are allocated to the same entities, serve the same target populations, and have the same desired outcomes for the purpose of consolidating grant funds and programs and moving toward a unified single delinquency intervention and prevention grant application process in adherence with all applicable federal guidelines and mandates;
- Cooperate with and render technical assistance to the Legislature, state agencies, local governments, or other public or private agencies, organizations, or institutions in matters relating to criminal justice and delinquency prevention;
- Develop incentives for units of local government to develop comprehensive regional partnerships whereby adjacent jurisdictions pool grant funds in order to deliver services, to a broader target population and maximize the impact of state funds at the local level;
- Conduct evaluation studies of the programs and activities assisted by the federal acts.
- Identify and evaluate state, local, and federal gang and youth violence suppression, intervention, and prevention programs and strategies, along with funding for those efforts. (Pen. Code, § 6027, subd. (b).)

*This bill*, upon appropriation, requires BSCC to award grant funding to 4 or more county superior courts or county probation departments to create demonstration projects to reduce the recidivism of high-risk misdemeanor probationers, as specified.

*This bill* states that the demonstration projects shall evaluate the probation completion and recidivism rates for project participants and may compare them to control groups to evaluate program efficacy.

*This bill* requires BSCC to determine criteria for awarding the grants on a competitive basis that shall take into consideration the ability of a county to conduct a formal misdemeanor probation project for high-risk misdemeanor probationers, including components that align with evidence-based practices in reducing recidivism, including, but not limited to, risk and needs assessment, programming to help with drug or alcohol abuse, mental illness, or housing, and the support of the superior court if the application is from a county probation department.

*This bill* requires BSCC to develop reporting requirements for the participating entities and requires those entities to report the results of the demonstration project to BSCC.

*This bill* requires BSCC to report to the Legislature and county criminal justice officials two years after the appropriation by the Legislature.

*This bill* contains a severability clause so in the event that any provision or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

*This bill* sunsets its provisions on January 1, 2026.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

Organized retail crime is defined as theft/fraudulent activity conducted with the intent to convert illegally obtained merchandise, cargo, cash, or cash equivalent into financial gain, often through subsequent online or offline sales. These operations typically involve a criminal enterprise that organizes multiple theft rings at a number of retail stores and employs a fencing operation to sell the illegally-obtained goods for financial gain.

In December of 2020, the NRF released their Organized Retail Crime study and found that organized retail theft continues to be pervasive within the industry. The study surveyed loss prevention executives from large and mid-sized retailers and found that retail crime had increased 68% with losses averaging over \$700,000 for every \$1 billion in sales.

In 2018, the Legislature passed AB 1065 (Jones-Sawyer) which created the crime of organized retail theft, as well as established the CHP property crimes task force. The crime of organized retail theft has since been used to bust retail theft rings throughout the state. In September of 2020, sheriffs arrested five people and recovered more than \$8 million in stolen property in San Mateo. In November, the Ventura County Sheriffs arrested two men on suspicion of organized retail theft, among other crimes, and recovered nearly \$10,000 in stolen goods.

AB 1065 also created the California Highway Patrol (CHP) task force, who is responsible for collaborating with the Department of Justice to identify highly target areas and assisting local law enforcement agencies with resources to address the crime.

In December of 2020, local law enforcement in cooperation with CHP officers recovered \$73,000 in stolen merchandise in “Operation Patrona” and another \$212,000 in stolen and fraudulently purchased goods in “Operation Liquidator” with both arrests taking place in Sacramento. Even as recently as February of 2021, CHP investigators arrested three people in connection with a massive retail

theft operation out of Reno and recovered more than \$150,000 in stolen merchandise along with \$7,000 in cash.

## **2. Organized Retail Theft**

The crime of organized retail theft was created by AB 1065 (Jones-Sawyer), Chapter 803, Statutes of 2018. The original law created the crime of organized retail as well as authorizing CHP to establish regional task forces to investigate property theft crimes. The law also contained various provisions expanding jurisdiction for theft, organized retail theft and receipt of stolen property; authorizing nonrelease of individuals arrested for misdemeanors when certain circumstances are present; specifying that a court may issue a bench warrant for a person who failed to appear if the defendant has been cited or arrested for a theft offense in the previous 6 months; and authorizing the creation of a diversion or deferred entry of judgment program for persons who commit theft and repeat theft offenses. The bill also authorized BSCC, upon appropriation by the Legislature, to award funding for a grant program to county superior courts or county probation departments to create demonstration projects to reduce the recidivism of high-risk misdemeanor probationers. AB 1065 contained a sunset date of January 1, 2021. A budget bill extended the sunset to July 1, 2026. (AB 94 (Comm. on Budget and Fiscal Rev.), Ch. 25, Stats. 2019.)

Subsequently, AB 331 (Jones-Sawyer), Chapter 113, Statutes of 2021, reenacted the provisions of the original bill that created the crime and established the CHP task force but did not reenact the other various provisions that were a part of AB 1065. SB 331 contains a sunset date of January 1, 2026.

This bill reauthorizes several provisions that were not reenacted through SB 331. Specifically, this bill reauthorizes repealed provisions that had authorized nonrelease of individuals arrested for misdemeanors when certain circumstances are present; specifying that a court may issue a bench warrant for a person who failed to appear if the defendant has been cited or arrested for a theft offense in the previous 6 months; authorizing the creation of a diversion or deferred entry of judgment program for persons who commit repeat theft offenses but also expands to apply to single theft offenses; and the BSCC grant program. This bill contains a sunset date of January 1, 2026.

## **3. Cite and Release of Misdemeanants**

Existing law states that any person who is arrested for a misdemeanor need not be taken before a magistrate and may be released on his or her promise to appear in court when required. (Pen. Code, § 853.6, subd. (a)(1).) This practice is commonly referred to as “cite and release” because it authorizes a person to be issued a citation and released on his or her own recognizance. This procedure is not allowed when a person has been arrested for certain crimes involving violence or if a person is arrested for a misdemeanor violation of a protective order involving domestic violence, as specified. In those cases, the arrestee must be taken before the court before he or she may be released from custody.

Additionally, an officer may choose not to release a misdemeanant in certain specified circumstances such as when the person is so intoxicated that he or she could be a danger or when

the person has an outstanding warrant. Existing law includes as one of the enumerated reasons for nonrelease when there is a reasonable likelihood that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested. (Pen. Code, § 853.6, subd. (i)(7).)

This bill adds when a person has been cited, arrested, or convicted for misdemeanor or felony theft from a store in the previous six months or when there is probable cause to believe that the person arrested is guilty of committing organized retail theft to the list of circumstances that would allow a peace officer to take a person into custody rather than releasing them on their own recognizance with a promise to appear in court at a later date.

#### **4. Bench Warrants for Failure to Appear**

Penal Code section 987.5 provides a nonexclusive list of situations in which a defendant's failure to appear in court as required by law may result in the judge issuing a bench warrant. These include, for example, when a person is released on their own recognizance on the promise of appearing at a certain time and place or is released from custody or arrest upon citation by a peace officer or other person authorized to issue citations and has signed a promise to personally appear in court at a specific time and place. (Pen. Code, § 978.5, subd. (a)(3) & (4).)

This bill would add that a bench warrant could be issued where the person has been cited or arrested for misdemeanor or felony theft from a store and has failed to appear in court in connection with that charge or those charges in the previous six months.

#### **5. Pretrial Diversion and Deferred Entry of Judgement**

Existing law authorizes pretrial diversion as well as deferred entry of judgment (DEJ) programs. (Pen. Code, §1001.)

Pre-trial diversion suspends the criminal proceedings without requiring the defendant to enter a plea. The defendant must successfully complete a program or other conditions imposed by the court. If a defendant does not successfully complete the diversion program, criminal proceedings resume but the defendant, having not entered a plea, may still proceed to trial or enter a plea. If diversion is successfully completed, the criminal charges are dismissed and the defendant may, with certain exceptions, legally answer that they have never been arrested or charged for the diverted offense.

DEJ, on the other hand, requires a defendant to first enter a guilty plea and entry of judgment on the defendant's guilty plea is deferred pending successful completion of a program or other conditions. If a defendant placed in a DEJ program fails to complete the program or comply with conditions imposed, the court may resume criminal proceedings and the defendant, having already pleaded guilty, would be sentenced.

Diversion programs were originally only established in local counties upon the prosecution's approval. (Pen. Code, § 1001 et seq.) Pursuant to those provisions, no program can continue without the approval of the prosecution and no person can be diverted under a diversion program unless it has been approved by the prosecution. (Pen. Code, §§ 1001.2, subdivision (b), 1001.50, subdivision (b); *People v. Marroquin* (2017) 15 Cal.App.5th Supplement 1, 37.) However, the prosecution is not authorized to determine whether a particular defendant shall be diverted. That determination still rests within the court's discretion. (Pen. Code, § 1001.2.)

In recent years, the Legislature has enacted pretrial diversion programs that a court may offer to a defendant, without the prosecution's approval. (See Pen. Code, § 1001.36 which authorizes mental health diversion; Pen. Code, § 1001.80 which authorizes military diversion; and Pen. Code, § 1001.95 which authorizes court-initiated misdemeanor diversion.)

This bill authorizes a city or county prosecuting attorney or county probation department to create a diversion or DEJ program for persons who commit a theft offense or repeat theft offenses. The program may be conducted by the prosecuting attorney's office or the county probation department. Upon receiving a case or at arraignment, the prosecuting attorney shall either refer the case to the county probation department to conduct a prefiling investigation report to assess the appropriateness of program placement or, if the prosecuting attorney's office operates the program, determine if the case is one that is appropriate to be referred to the program. In determining whether to refer a case to the program, the probation department or prosecuting attorney shall consider specified factors such as risk level and appropriateness of the program placement. "Repeat theft offenses" is defined to mean being cited or convicted for misdemeanor or felony theft from a store or from a vehicle two or more times in the previous 12 months and failing to appear in court when cited for these crimes or continuing to engage in these crimes after release or after conviction. This is almost identical to the diversion and DEJ program authorized by AB 1065 but also authorizes persons whose theft offense does not amount to repeat theft to be diverted.

## **6. BSCC Grant Program**

The BSCC was established in 2012 and is responsible for providing statewide leadership, coordination, and technical assistance to promote effective state and local efforts and partnerships in California's adult and juvenile justice systems. The BSCC has four primary responsibilities: setting standards for and inspecting local detention facilities; setting standards for the selection and training of local correctional staff; administering various grant programs related to recidivism and reduction strategies; and administering the state's construction financing program for local detention facilities.

This bill would require BSCC to award grant funding to 4 or more county superior courts or county probation departments to create demonstration projects to reduce the recidivism of high-risk misdemeanor probationers, as specified. BSCC is to determine criteria for awarding the grants on a competitive basis that shall take into consideration the ability of a county to conduct a formal misdemeanor probation project for high-risk misdemeanor probationers, including components that align with evidence-based practices in reducing recidivism, including, but not limited to, risk and needs assessment, programming to help with drug or alcohol abuse, mental illness, or housing, and the support of the superior court if the application is from a county probation department.

The bill would also require BSCC to develop reporting requirements for the participating entities and would require those entities to report the results of the demonstration project to the board. BSCC would be required to report to the Legislature and county criminal justice officials two years after the appropriation by the Legislature.

**7. Argument in Support**

According to the Peace Officers Research Association of California:

Current law requires a peace officer to release a person who has been arrested for a misdemeanor after securing that person's promise to appear, as specified, unless certain conditions are met for nonrelease, including, among others, there is reason to believe that the person would not appear as required or there was a reasonable likelihood that the offense or offenses for which the person was arrested would continue or resume. This bill, until January 1, 2026, would include in the reasons for nonrelease that the person has been cited, arrested, or convicted for misdemeanor or felony theft from a store in the previous 6 months and that there is probable cause to believe that the person arrested is guilty of committing organized retail theft.

**-- END --**