
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No: SB 1108 **Hearing Date:** March 29, 2022
Author: Bates
Version: February 16, 2022
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Shoplifting: increased penalties for prior crimes*

HISTORY

Source: Author

Prior Legislation: AB 1597 (Waldron), failed Asm. Public Safety, 2022
SB 710 (Bates), failed Sen. Public Safety, 2020
SB 979 (Jones), failed Sen. Public Safety, 2020
AB 1326 (Cooper), failed Asm. Public Safety, 2017
AB 875 (Cooper), failed Asm. Public Safety, 2017
AB 2287 (Lackey), never heard in Sen. Public Safety, 2016
AB 2369 (Patterson), failed Asm. Public Safety, 2016

Support: Arcadia Police Officers Association; Burbank Police Officers' Association; California Coalition of School Safety Professionals; California Retailers Association (support if amended); California State Sheriffs' Association; Claremont Police Officers Association; Corona Police Officers Association; Culver City Police Officers' Association; El Dorado County Chamber of Commerce; Elk Grove Chamber of Commerce; Folsom Chamber of Commerce; Fullerton Police Officers' Association; Inglewood Police Officers Association; Los Angeles School Police Officers Association; Newport Beach Police Association; Palos Verdes Police Officers Association; Peace Officers Research Association of California (PORAC); Placer County Deputy Sheriffs' Association; Pomona Police Officer Association; Rancho Cordova Chamber of Commerce; Riverside Police Officers Association; Riverside Sheriffs' Association; Roseville Chamber of Commerce; San Bernardino County Sheriff's Department; Santa Ana Police Officers Political Action Committee; United Chamber Advocacy Network; Upland Police Officers Association; Yuba Sutter Chamber of Commerce

Opposition: ACLU California Action; California Attorneys for Criminal Justice; California Public Defenders Association; Californians for Safety and Justice; Communities United for Restorative Youth Justice; Courage California; Drug Policy Alliance; Ella Baker Center for Human Rights; Faith in the Valley; Friends Committee on Legislation of California; Initiate Justice; Legal Aid at Work; Legal Services for Prisoners With Children

PURPOSE

The purpose of this bill is to reinstate the offense of “petty theft with a prior” as it existed prior to the passage of Proposition 47.

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. (Pen. Code, § 487.)

Existing law states that petty theft is punishable by a fine not exceeding \$1,000, by imprisonment in the county jail not exceeding six months, or both. (Penal Code § 490.)

Existing law defines “shoplifting” as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed \$950 dollars. (Pen. Code, § 459.5, subd. (a).)

Existing law states that any act of shoplifting must be charged as such, and that a person charged with shoplifting cannot also be charged with burglary or theft of the same property. (Pen. Code, § 459.5, subd. (b).)

Existing law punishes shoplifting as a misdemeanor, except where a person has a prior “super strike” or a registrable sex conviction, in which case the offense is punished as a felony by imprisonment in the county jail pursuant to realignment. (Pen. Code, § 459.5, subd. (a).)

Existing law designates the following offenses to be “super strikes”: specified sex offenses, homicide, solicitation to commit murder, assault with a machine gun on a peace officer or firefighter, possession of a weapon of mass destruction, and any serious or violent felony punishable by life imprisonment or death. (Pen. Code, § 667, subd. (e)(2)(C)(iv).)

Existing law provides that, notwithstanding the punishment for petty theft, if a person is required to register as a sex offender, has a prior “super strike conviction,” or has a conviction for a specified theft-related offense against an elder or dependent adult, and also has been convicted of a specified theft-related offense for which he or she was imprisoned, and is subsequently convicted of petty theft, then the person is to receive an enhanced punishment of imprisonment in the county jail not to exceed one year, or in the state prison. (Pen. Code, § 666.)

This bill adds shoplifting to the list of offenses for which a person who is required to register as a sex offender, has a prior “super strike conviction,” or has a prior conviction for a specified theft-related offense against an elder or dependent adult may be punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

This bill provides that a person who has been convicted three or more times of petty theft, shoplifting, grand theft, financial elder or dependent adult abuse, auto theft, burglary, carjacking, robbery, or a felony conviction receiving stolen property and who is subsequently convicted of petty theft may be punished alternatively with a county-jail eligible felony or misdemeanor.

COMMENTS

1. Need for This Bill

According to the author of this bill:

In December 2021, PPIC stated that within four of California's major cities (Los Angeles, Oakland, San Diego and San Francisco) data shows increases in property crime. Property crime rose nearly 7% when comparing the first ten months of 2021 and 2020. After hovering around 20,000 reported property crimes per month in early 2021, the numbers have increased to 25,000 in October, the highest monthly total since the beginning of the pandemic.

While most of the recent "smash and grab" thefts are already punishable as felonies, lack of sufficient penalties to deter serial theft are a problem with repeat offenders who commit multiple petty theft violations. In a 2019 survey conducted by the California Chamber of Commerce, 74% of participants stated that they supported "adding a felony for serial theft."

When voters approved Proposition 47, they wanted to ensure that the criminal justice system focused on violent and serious offenses and to find alternatives for non-serious, non-violent crime. But now that property crimes are on the rise, putting this question in front of the voters gives them a chance to decide whether serial theft is a serious offense or should continue to be treated under the terms of Proposition 47.

2. Proposition 47 and Theft Offenses

Proposition 47, approved by voters on November 4, 2014, reduced the penalties for certain drug and property crimes and required that the resulting state savings be directed to mental health and substance abuse treatment, truancy and dropout prevention, and victims' services. Proposition 47 contained specific language reflecting the purpose and intent of the proposition:

"In enacting this act, it is the purpose and intent of the people of the State of California to: ". . . (3) Require misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes. . . ."

(<http://vig.cdn.sos.ca.gov/2014/general/pdf/text-of-proposed-laws1.pdf#prop47>)

"One of Proposition 47's primary purposes is to reduce the number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative." (*Harris v. Superior Court* (2016) 1 Cal.5th 984, 992, citing Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70.)

Specifically, the initiative reduced the penalties for possession for personal use of most illegal drugs to misdemeanors. The initiative also directed that theft crimes of \$950 or less shall be considered petty theft and be punished as a misdemeanor, with limited exceptions for individuals with specified prior convictions.

Among the theft crimes made misdemeanors by Proposition 47, where the value of the property is \$950 or less, are forgery (Pen. Code, § 473), making or delivering a check with insufficient funds (Pen. Code, § 476a), petty theft (Pen. Code, § 490.2), and receiving stolen property (Pen. Code, § 496). (See *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Proposition 47 also created the new offense of commercial burglary, a misdemeanor, where the value of the property taken or intended to be taken is \$950 or less (Pen. Code, § 459.5; *People v. Sherow* (2015) 239 Cal.App.4th 875, 879); and, pertinent to this bill, limited the application of petty theft with a prior theft conviction. (Pen. Code, § 666; *People v. Rivera, supra*, 233 Cal.App.4th at p. 1091.)

Prior to Proposition 47, Penal Code section 666 provided that every person who has been convicted three or more times of petty theft, grand theft, financial crimes against elders, vehicle theft, burglary, carjacking, robbery, or a felony violation of receiving stolen property and has served any time in custody for those offenses, upon a new conviction for petty theft may be punished alternatively with either a felony or misdemeanor. Proposition 47 repealed this part of Penal Code section 666 and limited its application to persons who have previously been convicted of a “super strike,” financial abuse of an elder, or an offense requiring sex offender registration.

This bill seeks to restore the wobbler penalties for petty theft with a prior conviction to any person with three or more theft convictions, and expand it to the new crime of shoplifting created by Proposition 47.

3. California Constitutional Limitations on Amending a Voter Initiative

Because Proposition 47 was a voter initiative, the Legislature may not amend the statute without subsequent voter approval unless the initiative permits such amendment, and then only upon whatever conditions the voters attached to the Legislature's amendatory powers. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568; see also Cal. Const., art. II, § 10, subd. (c).) The California Constitution states, "The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." (Cal. Const., art. II, § 10, subd. (c).) Therefore, unless the initiative expressly authorizes the Legislature to amend, only the voters may alter statutes created by initiative.

The purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent. Courts have a duty to jealously guard the people's initiative power and, hence, to apply a liberal construction to this power wherever it is challenged in order that the right to resort to the initiative process is not improperly annulled by a legislative body. (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473.)

As to the Legislature's authority to amend the initiative, Proposition 47 states:

This act shall be broadly construed to accomplish its purposes. The provisions of this measure may be amended by a two-thirds vote of the members of each house of the Legislature and signed by the Governor so long as the amendments are consistent with and further the intent of this act. The Legislature may by majority vote amend, add, or repeal provisions to further reduce the penalties for any of the

offenses addressed by this act. (<<http://vig.cdn.sos.ca.gov/2014/general/pdf/text-of-proposed-laws1.pdf#prop47>>.)

This bill seeks to increase punishment for repeat offenders for the crimes which were reduced to misdemeanors by Proposition 47. As such, it is inconsistent with the purpose of Proposition 47. Therefore, pursuant to the above-referenced provisions of the California Constitution, only the voters may authorize the provisions.

This bill, if approved by the Legislature, calls for a special election to be consolidated with the November 8, 2022, statewide general election.

In the November 2020 election, almost 62% of voters rejected a broader effort to roll back portions of Proposition 47. Proposition 20, among other things, would have created the crime of serial theft for a person with two or more prior convictions for theft-related crimes, would have created a separate crime of organized retail theft, and would have required DNA collection for crimes that were reduced to misdemeanors by Proposition 47.

([https://ballotpedia.org/California Proposition 20, Criminal Sentencing, Parole, and DNA Collection Initiative \(2020\)](https://ballotpedia.org/California_Proposition_20,_Criminal_Sentencing,_Parole,_and_DNA_Collection_Initiative_(2020)) [as of March 17, 2022].)

4. Proposed Initiative to Undo Provisions of Proposition 47

A proposed initiative for the November 2022 ballot would undo changes made by Proposition 47 by authorizing felony sentences for specified thefts and requiring longer sentences. Specifically, the proposed initiative:

Authorizes prosecutors to file felony or misdemeanor charges for thefts of any amount under \$950—currently chargeable as felonies only in certain circumstances—against any person with two or more prior specified theft convictions. Adds mandatory sentencing enhancement for any felony resulting in significant property loss or damage, ranging from one additional year for losses over \$50,000, to four years for losses over \$3,000,000, plus one year for each additional \$3,000,000. Authorizes prosecution for theft in any county where acts in furtherance occurred.

(See Secretary of State’s website <<https://www.sos.ca.gov/elections/ballot-measures/initiative-and-referendum-status/initiatives-referenda-cleared-circulation>> [as of Mar. 17, 2022].) The proposed initiative is currently in signature gathering stage and needs 623,212 signatures in order to be certified for the 2022 ballot. (*Ibid.*)

5. Data on Effects of Proposition 47

According to data from the California Department of Justice, California’s crime rates have risen back to pre-pandemic levels, however, these rates are still historically low. After a steady increase between the 1960s to the 1980s, crime rates have steadily declined and is now similar to the rates seen in the 1960s. This applies to both violent crimes and property crimes, although both have seen an increase since 2020. While crime rates vary between counties, most counties experienced a decrease in property crime. (Crime Trends in California, Public Policy Institute of California (Jan. 2022), <https://www.ppic.org/publication/crime-trends-in-california/> [as of Mar. 22, 2022].)

After the passage of Proposition 47, there was a slight increase in property crimes, specifically car thefts and larceny, but in 2016 the property crime rates again declined. (The Impact of Proposition 47 on Crime and Recidivism, PPIC (June 2018), https://www.ppic.org/wp-content/uploads/r_0618mbr.pdf [as of Mar. 22, 2022].) Proposition 47 reduced recidivism and within months of its passage, the prison population dropped below its court-mandated target arising out of lawsuits over poor conditions and overcrowding in the state prisons. (*Id.* at pp. 4-5.)

Proposition 47 also had the impact of decreasing racial disparities in arrests and bookings. Specifically, this decrease in disparity has been driven by trends in arrests for drug and property crimes. According to PPIC, “the gap in arrest rates between African Americans and whites for drug and property offenses (including felonies and misdemeanors) dropped by 24.4 percent after Prop 47, while the gap in booking rates narrowed by 32.6 percent. The decline in arrests and bookings for drug felonies is especially striking. For these offenses, the gap in the arrest and booking rates between African Americans and whites narrowed by about 55 percent. As a result, African American arrest and booking rates for drug felonies are now lower than the rates were for whites before Prop 47 passed.” (<https://www.ppic.org/press-release/prop-47-has-reduced-racial-disparities-in-arrests-and-bookings-in-california-but-serious-inequities-remain/> (Jun. 23, 2020).)

6. Increasing Penalties Has Minimal Deterrent Effect

A comprehensive report published in 2014, entitled *The Growth of Incarceration in the United States*, discusses the effects on crime reduction through incapacitation and deterrence, and describes general deterrence compared to specific deterrence:

A large body of research has studied the effects of incarceration and other criminal penalties on crime. Much of this research is guided by the hypothesis that incarceration reduces crime through incapacitation and deterrence. Incapacitation refers to the crimes averted by the physical isolation of convicted offenders during the period of their incarceration. Theories of deterrence distinguish between general and specific behavioral responses. General deterrence refers to the crime prevention effects of the threat of punishment, while specific deterrence concerns the aftermath of the failure of general deterrence—that is, the effect on reoffending that might result from the experience of actually being punished.

(National Research Council (2014) *The Growth of Incarceration in the United States: Exploring Causes and Consequences* Committee on Causes and Consequences of High Rates of Incarceration, J. Travis, B. Western, and S. Redburn, Editors. Committee on Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press. (http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf.)

In regard to deterrence, the authors note that in “the classical theory of deterrence, crime is averted when the expected costs of punishment exceed the benefits of offending. Much of the empirical research on the deterrent power of criminal penalties has studied sentence enhancements and other shifts in penal policy.” (National Research Council, *supra*, *The Growth of Incarceration in the United States*, p. 132.)

Deterrence theory is underpinned by a rationalistic view of crime. In this view, an individual considering commission of a crime weighs the benefits of offending

against the costs of punishment. Much offending, however, departs from the strict decision calculus of the rationalistic model. Robinson and Darley (2004) review the limits of deterrence through harsh punishment. They report that offenders must have some knowledge of criminal penalties to be deterred from committing a crime, but in practice often do not.

(*Id.* at p. 133.) The report concludes: The incremental deterrent effect of increases in lengthy prison sentences is modest at best. “Because recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate or extremely dangerous offenders, are an inefficient approach to preventing crime by incapacitation.” (*Id.* at p. 5.)

This bill increases the potential sentence for a person who commits petty theft with three prior convictions. Generally, a person convicted of petty theft is subject to misdemeanor penalties. This bill would increase those penalties to a felony if the person has three prior theft-related convictions. As discussed above, increasing penalties does little to deter crimes.

7. Argument in Support

According to the San Bernardino County Sheriff’s Department:

SB 1108 is a step to allow voters to replace Proposition 47 with the pre-2014 language. Proposition 47, as passed by voters reduced several felonies to misdemeanors and carried forward a \$950 threshold related to the charging of petty theft and shoplifting offenses. In recent years, communities have experienced an increase in shoplifting and smash and grab thefts. Subjects have been arrested several times for the same crime within a short time because of the insufficient penalty. Additional criminal acts have become much more common in the wake of these changes.

SB 1108 gives the people of California the opportunity to reverse these statutory changes towards the ends of promoting justice and avoiding the creation of new victims. This bill also would make the provision related to a person with serious, violent, or sexual prior offenses applicable to a person whose prior or current conviction is for shoplifting.

8. Argument in Opposition

According to the Californians for Safety and Justice:

SB 1108 calls for a special election to amend Proposition 47. This bill signals a return to the failed tough on crime policies of the past and would undermine public safety by increasing the costly and counterproductive incarceration in state prison for some of the lowest level crimes in the state penal code. Repealing parts of Prop. 47 would also rob our local communities of hundreds of millions of dollars that Prop 47 will save annually. This savings is reallocated back to communities for proven crime prevention programs that address the root causes and stop the cycle of crime.

Prop. 47 did not affect serious or violent felonies, but instead targeted several low-level theft offenses and drug possession for personal use for reform. Political

rhetoric notwithstanding, since its enactment, property crime has decreased in California.[1] Not dissuaded, in 2020, “tough on crime” advocates tried to persuade the public to repeal Prop. 47 via Prop. 20. Again, California voters rejected the attempt to go back to mass incarceration.

SB 1108 proposes to make it easier to charge non-violent Californians with felonies and to go back to the same shortsighted “tough on crime” measures that have failed California for the past three decades. It is yet another attempt to go down a path that California’s voters have already twice rejected. Significantly, reverting these crimes back to felonies would once again dramatically increase incarceration rates, leaving the state vulnerable to falling out of compliance with the prison system’s population cap mandated by the federal judiciary.

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