
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: SB 1242 **Hearing Date:** April 2, 2024
Author: Min
Version: March 19, 2024
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Crimes: fires*

HISTORY

Source: Author

Prior Legislation: AB 1065 (Jones-Sawyer), Ch., Stats. 2019

Support: California Retailers Association

Opposition: None known

PURPOSE

The purpose of this bill is to specify that for the crime of reckless arson, the fact that the offense was carried out within a merchant's premises in order to facilitate organized retail theft shall be a factor in aggravation at sentencing.

Existing law states that when a statute prescribes three possible terms of imprisonment, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term, except when there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment exceeding the middle term, and the facts underlying those circumstances have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial. (Pen. Code, § 1170, subd. (b).)

Existing law provides that except where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law, upon request of a defendant, trial on the circumstances in aggravation alleged in the indictment or information shall be bifurcated from the trial of charges and enhancements. (Pen. Code, § 1170, subd. (b)(2).)

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 retail theft as follows:

- If violations of the above provisions, except the recruiting, coordinating, organizing, supervising, directing, managing, or financing another provision, 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 either a misdemeanor by imprisonment in a county jail not exceeding one year or as a jail-eligible felony;
- Any other violation of the above provisions, except the recruiting, coordinating, organizing, supervising, directing, managing, or financing another provision, 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 another provision is punishable as either a misdemeanor by imprisonment in a county jail not exceeding one year or as a jail-eligible felony. (Pen. Code, § 490.1, subd. (b).)

Existing law states that a person is guilty of unlawfully causing a fire when they recklessly set fire to, burn, or cause to be burned, any structure, forest land, or property. (Pen. Code, § 452.)

Existing law punishes reckless arson as follows:

- Unlawfully causing a fire that causes great bodily injury is a felony punishable by imprisonment in the state prison for two, four or six years, or by imprisonment in the county jail for not more than one year, or by a fine, or by both such imprisonment and fine.
- Unlawfully causing a fire that causes an inhabited structure or inhabited property to burn is a felony punishable by imprisonment in the state prison for two, three or four years, or by imprisonment in the county jail for not more than one year, or by a fine, or by both such imprisonment and fine.
- Unlawfully causing a fire of a structure or forest land is a felony punishable by imprisonment in the state prison for 16 months, two or three years, or by imprisonment in the county jail for not more than six months, or by a fine, or by both such imprisonment and fine.
- Unlawfully causing a fire of property is a misdemeanor.
- In the case of any person convicted of violating this section while serving a term of imprisonment for a felony or misdemeanor conviction, any sentence imposed shall be consecutive to the sentence for which the person was then confined. (*Id.*)

This bill provides that for purposes of sentencing for reckless arson, the fact that the offense was carried out within a merchant's premises in order to facilitate organized retail theft shall be a factor in aggravation.

COMMENTS

1. Need for This Bill

According to the author of this bill:

Retail theft has become increasingly sophisticated in recent years with scenarios where fire is being used as a tactic to hide and distract from criminal activity. SB 1242 is part of a comprehensive strategy to hold criminals accountable, while giving law enforcement the tools they need to successfully prosecute these heinous crimes that put both local communities and retailers at risk. The higher sentences authorized under this bill will help deter crime and put a stop to this destructive trend that costs businesses millions in damages, on top of investigative costs to local fire officials.

2. Background: California's Determinate Sentencing Law

In 1977, California adopted the Determinate Sentencing Law, moving away from a system of indeterminate sentences with high maximum terms and broad parole discretion to specified set terms of imprisonment. Under a determinate sentencing system, the court selects from one of the three statutorily specified terms of imprisonment. This is generally referred to as sentencing triad, which specifies a lower, middle, and higher term of incarceration for violation of the offense.

Prior to 2007, the law provided a statutory presumption that the middle term was to be imposed unless aggravating or mitigating factors supported the imposition of the upper or lower term. The Rules of Court provides lists of both aggravating factors and mitigating factors. In each category there are factors relating to the crime and factors relating to the defendant. (CITE) In *Cunningham v. California* (2007) 549 U.S. 270, the United States Supreme Court held California's determinate sentencing law violated a defendant's right to trial by jury guaranteed under the Sixth Amendment to the U.S. Constitution. (*Id.* at p. 274.) Specifically the Court held that "[b]ecause circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, . . . the DSL violates *Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Id.* at pp. 288-289, relying on *Apprendi v. U.S.* (2000) 530 U.S. 466.)

The Supreme Court provided direction as to what steps the Legislature could take to address the constitutional infirmities of the DSL:

As to the adjustment of California's sentencing system in light of our decision, the ball . . . lies in [California's] court. We note that several States have modified

their systems in the wake of *Apprendi* and *Blakely* to retain determinate sentencing. They have done so by calling upon the jury - either at trial or in a

separate sentencing proceeding - to find any fact necessary to the imposition of an elevated sentence. As earlier noted, California already employs juries in this manner to determine statutory sentencing enhancements. Other States have chosen to permit judges genuinely to exercise broad discretion . . . within a statutory range, which, everyone agrees, encounters no Sixth Amendment shoal. California may follow the paths taken by its sister States or otherwise alter its system, so long as the State observes Sixth Amendment limitations declared in this Court's decisions." (*Cunningham, supra*, 549 U.S. at pp. 293-294.)

Following *Cunningham*, the Legislature amended the determinate sentencing law, specifically Penal Code sections 1170 and 1170.2, to make the choice of lower, middle, or upper prison terms one within the sound discretion of the court. (SB 40 (Romero), Ch. 3, Stats. 2007.) This approach was embraced by the California Supreme Court in *People v. Sandoval* (2007) 41 Cal.4th 825, 843-852. The procedure removes the mandatory middle term and the requirement of weighing aggravation against mitigation before imposition of the upper term. Under the amended sections, the sentencing court was permitted to impose any of the three terms in its discretion, and need only state reasons for the decision so that it will be subject to appellate review for abuse of discretion.

SB 40 (Romero), the first of a series of legislation to provide a fix to the constitutional shortcomings of the determinate sentencing law, contained a sunset provision so that the amendment to the determinate sentencing law would be repealed on a certain date if further legislative action was not taken before that date. According to intent language contained in SB 40, "It is the intent of the Legislature in enacting this provision to respond to the decision of the United States Supreme Court in *Cunningham v. California*, 2007 U.S. LEXIS 1324 (U.S. 2007). It is the further intent of the Legislature to maintain stability in California's criminal justice system while the criminal justice and sentencing structures in California sentencing are being reviewed." Following SB 40 (Romero), several bills extended the sunset on the amended DSL to continue allowing judges the discretion to impose the lower, middle or upper term of imprisonment authorized by statute.

However, in 2021, instead of extending the sunset on the amended determinate sentencing law that gives broad discretion to the court to make the choice between the three terms, the Legislature enacted legislation to authorize a court to impose the upper term only if the defendant admits the aggravating circumstance or found true beyond a reasonable doubt at trial by a jury. (SB 567 (Bradford), Ch. 731, Stats. 2024.) The purpose of this change in approach was to give the jury a chance weigh in on the truthfulness of the circumstances that would increase a person's sentence. The Rules of Court provides lists of both aggravating factors and mitigating factors. (Cal. Rules of Court, Rule 4.421.) In each category there are factors relating to the crime and factors relating to the defendant.

Additionally, some statutes specify factors in aggravation that may be relied upon to increase a person's sentence beyond the middle term. This bill specifies that the fact that the offense was carried out within a merchant's premises in order to facilitate organized retail theft, as defined in Section 490.4, shall be a factor in aggravation for purposes of sentencing a person found guilty of reckless arson.

3. Reported Incidents of Setting Fires in Retail Stores

As noted in the author's statement, the impetus for this bill is the recent reported incidents of fires being set in retail stores to create a distraction while committing theft within the store.

On September 13, 2023, a woman was arrested for starting a fire in a Target store in Buena Park as a distraction so she could steal baby formula. It was unclear to investigators whether she was stealing the formula for personal use or as part of a retail theft scheme to resell the product. The fire cause \$500,000 in damage to the store's building and \$1 million damage to products. (<https://www.latimes.com/california/story/2023-09-13/buena-park-target-fire-woman-arrested-baby-formula-theft> [as of Mar. 22, 2024].)

On April 16, 2023, two men were arrested for setting a fire inside a North Highlands Target to create a distraction to commit retail theft. The men were booked on felony charges of burglar, grand theft, arson and conspiracy. (<https://www.kcra.com/article/sacramento-county-target-fire-suspect/43612303> [as of Mar. 22, 2024].)

4. Renewed Efforts to Combat Property Crimes

“The Homelessness, Drug Addition, and Theft Reduction Act” is a new initiative that would make specific changes to laws enacted by Proposition 47. Specifically, the initiative would reenact felony sentencing for petty theft with two prior thefts, allow multiple petty thefts to be aggregated to meet the \$950 threshold without a showing that the acts were connected, and create new enhancements depending on the amount of property stolen or damaged. The initiative would also increase penalties for certain drug crimes, mandate treatment for certain offenders, and require courts to warn people convicted of drug distribution that they may be charged with murder in the future if someone dies after taking an illegal drug provided by that person. ([https://ballotpedia.org/California_Drug_and_Theft_Crime_Penalties_and_Treatment-Mandated_Felonies_Initiative_\(2024\)](https://ballotpedia.org/California_Drug_and_Theft_Crime_Penalties_and_Treatment-Mandated_Felonies_Initiative_(2024)) [as of Mar. 1, 2024].) The initiative is supported by various law enforcement, public officials, district attorneys, and retail corporations. (*Id.*) To qualify for the November 2024 ballot, the law requires 546,651 valid signatures by June 27, 2024; as of January 25, 2024, the campaign had notified the Secretary of State that 25% of the required signatures had been collected. (*Id.*)

On January 9, 2024, Governor Newsom called for legislation to crack down on large scale property crimes committed by organized groups who profit from resale of stolen goods. (<https://www.gov.ca.gov/2024/01/09/property-crime-framework/> [as of Mar. 1, 2024].) The proposals include: 1) creating new penalties targeting those engaged in retail theft to resell, and those that resell the stolen property; 2) clarifying existing arrest authority so that police can arrest suspects of retail theft, even if they didn't witness the crime in progress; 3) clarifying that theft amounts may be aggregated to reach the grand theft threshold; 4) creating new penalties for professional auto burglary, increasing penalties for the possession of items stolen from a vehicle with intent to resell, regardless of whether the vehicle was locked; 5) eliminating the sunset date for the organized retail crime statute; and 6) increasing penalties for large-scale resellers of stolen goods.

Both houses of the Legislature have announced legislative packages that include parts of the Governor's proposals. (See <https://www.latimes.com/california/story/2024-02-26/senate-leaders-respond-to-states-fentanyl-crisis-and-organized-retail-theft-problem-with-new-legislation> [as of Mar. 1, 2024]) and <https://www.latimes.com/california/story/2024-02-15/democratic-lawmakers->

[introduce-legislation-to-target-organized-retail-theft-online-resellers#:~:text=If%20passed%2C%20the%20bill%20would,if%20there%20were%20separate%20victims \[as of Mar. 1, 2024\].\)](#)

5. Arguments in Support

According to the California Retailers Association:

This bill highlights the heightened severity and potential harm caused by arson, especially when targeted at businesses and within their premises. Such acts of arson not only endanger lives but also disrupt store operations and further undermine community safety. When fires are lit inside stores, they often must close for weeks to replace products damaged due to fire, smoke, or water damage.

The California Retailers Association is the only statewide trade association representing all segments of the retail industry including general merchandise, department stores, mass merchandisers, on-line marketplaces, restaurants, convenience stores, supermarkets and grocery stores, retail pharmacies, and specialty retail such as auto, vision, jewelry, hardware, and home stores.

SB 1242, paired with a package of other measures introduced in the state legislature, will keep our employees, our customers and the neighborhoods retailers operate in safe from this criminal activity.

-- END --