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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

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**Bill No:** SB 82                      **Hearing Date:** March 16, 2021  
**Author:** Skinner  
**Version:** February 8, 2021  
**Urgency:** No                              **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Petty theft*

## HISTORY

**Source:** California Attorneys for Criminal Justice  
California Public Defenders Association  
Californians for Safety and Justice

**Prior Legislation:** None

**Support:** American Civil Liberties Union; Bend the Arc; Jewish Action; Communities United for Restorative Youth Justice; Drug Policy Alliance; Ella Baker Center for Human Rights; Fresno Barrios Unidos; Friends Committee on Legislation of California; Initiate Justice; Legal Services for Prisoners With Children; Prosecutors Alliance of California; Re:Store Justice; Rubicon Programs; San Francisco Public Defender's Office; Smart Justice California; Time for Change Foundation

**Opposition:** Alameda County District Attorney's Office

### *As Proposed to be Amended in Committee*

## PURPOSE

***The purpose of this bill is to require theft of property that is valued under \$950 where specified circumstances are not present to be charged as a misdemeanor.***

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

*Existing law* states that grand theft is committed when the money, labor, or real or personal property taken is of a value exceeding \$950, except in specified cases of theft authorizing a lower threshold. (Pen. Code, § 487.)

*Existing law* states that any other case of theft is petty theft. (Pen. Code, § 488.)

*Existing law* states that petty theft is a misdemeanor punishable by a fine not exceeding \$1000 or by imprisonment in the county jail not exceeding 6 months, or both. (Pen. Code, § 490.)

*Existing law* states that grand theft is generally punishable as an alternate felony-misdemeanor. (Pen. Code, § 489, subd. (c).)

*Existing law* defines robbery as the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. (Pen. Code, § 211.)

*Existing law* provides that “fear” for purposes of robbery may include fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery. (Pen. Code, § 212.)

*Existing law* punishes first degree robbery as a felony punishable by imprisonment in the state prison for 3, 4, or 6 years, or by imprisonment in the state prison for 3, 6, or 9 years the robbery is accomplished in concert with two or more persons. (Pen. Code, § 213, subd. (a)(1).)

*Existing law* punishes second degree robbery as a felony punishable by imprisonment in the state prison for 2, 3, or 5 years. (Pen. Code, § 213, subd. (a)(2).)

*This bill* classifies the crime of petty theft into two degrees.

*This bill* provides that petty theft in the first degree is the taking the property from the person of another or from a commercial establishment by means of force or fear without the use of a deadly weapon or great bodily injury.

*This bill* states that all other forms of petty theft are in the second degree.

*This bill* provides that an act of petty theft in the first degree shall be charged as such, and shall not be charged as robbery or burglary.

*This bill* punishes petty theft in the first degree by a fine not exceeding one thousand dollars (\$1,000), by imprisonment in a county jail not exceeding one year, or both.

*This bill* authorizes a person currently serving a felony sentence to file a petition to have the petitioner’s conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:

- The person is currently serving a sentence based on a conviction for robbery, the person was sentenced under an alternative sentencing scheme based on one or more prior convictions for robbery, or the person’s sentence includes an enhancement based on one or more prior convictions for robbery;
- The person did not use a deadly weapon or cause great bodily injury during the robbery that is the basis of the current conviction or one or more of the prior convictions used in sentencing the individual; and,
- The person could not be convicted of robbery based on the provisions in this bill creating petty theft in the first degree.

*This bill* authorizes other persons who have previously been convicted of robbery to file a petition to have the petitioner's conviction vacated when all of the following conditions apply:

- The person did not use a deadly weapon or cause great bodily injury during the robbery; and,
- The person could not be convicted of robbery based on the provisions of this bill creating petty theft in the first degree.

*This bill* states that the petition shall be filed with the presiding judge of the court that sentenced the petitioner and shall be served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted. The presiding judge may assign the petition to the judge that originally sentenced the petitioner or another judge designated to review such petitions.

*This bill* requires the petition to include all of the following:

- A declaration by the petitioner that the petitioner is eligible for relief as provided;
- The superior court case number and year of the petitioner's conviction; and,
- Whether the petitioner requests the appointment of counsel.

*This bill* states that if any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice and advise the petitioner that the matter cannot be considered without the missing information. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner.

*This bill* requires the prosecutor to file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor's response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that the petitioner is entitled to relief, the court shall issue an order to show cause.

*This bill* requires the court to hold a hearing to determine whether to vacate the conviction within 60 days after the order to show cause has issued and whether to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously sentenced, provided that the new sentence, if any, is not greater than the initial sentence. This deadline shall be extended for good cause.

*This bill* provides that the parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have the conviction vacated and for resentencing.

*This bill* states that at the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence.

*This bill* states that a person who is resentenced pursuant to this section shall be given credit for time served.

*This bill* clarifies that the resentencing provisions of this bill do not diminish or abrogate any rights or remedies otherwise available to the petitioner.

*This bill* provides the following legislative findings and declarations:

- The Penal Code Review Committee has concluded that the current law regarding theft is out of date and leads to unjust results, warranting reform;
- It is the intent of the Legislature to reform the theft statutes to ensure fair punishment and to apply those changes retroactively.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

California's robbery statute has not been updated since 1872. The 150-year-old definition of robbery still allows people to be sentenced to substantial terms in prison for minor petty thefts where the incident involved a perception of fear or a very minimal use of force.

Current law allows prosecutors to charge some types of simple theft such as shoplifting or snatching a cell phone as felony robbery. The blurred interpretation between robbery and theft has resulted in convictions and lengthy prison sentences disproportionate to the crime. Under current law, a person who used minimal "force" or was perceived to invoke "fear" during a petty theft can be charged and convicted of robbery, which is a felony. The terms "force" and "fear" can be interpreted loosely. For example, someone accused of having made a verbal threat during a shoplifting incident, even when no force was used and no weapon was involved, can be charged with robbery. Likewise, if the person accused of shoplifting bumps into another customer or security guard while running out of the store causing no serious injury, their charge can be elevated to robbery. Individuals experiencing a mental health crisis or who have a developmental disability also have a higher likelihood of having their charge include force or fear.

Under current law, prosecutors can elect not to charge robbery when minimal force is used. However, that discretion is not always exercised resulting in many shoplifting or other petty theft crimes being elevated to robbery, a felony that carries up to a five-year prison sentence.

SB 82 sets to establish a clear distinction between theft and robbery by creating a second category of petty theft for cases where no weapon was used and no one was seriously injured, but where there may have been an inadvertent use of force or perceived fear.

The Committee on the Revision of Penal Code, which includes judges in its membership, discussed at length the need to address the problem of theft being charged as robbery and recommended the code changes contained in SB 82. New York, Oregon, Illinois and Texas are among the states that have enacted similar statutes.

## 2. Existing Theft Laws

Existing law contains various statutes that criminalize theft. The crime of theft is separated into two degrees: petty theft and grand theft. Grand theft is generally separated from petty theft by a threshold amount established in statute. Currently, the amount of taking or loss that constitutes grand theft is that which has value in excess of \$950. Thefts that do that reach that threshold amount are generally considered petty theft.

Petty theft is punishable as a misdemeanor. Grand theft is punishable as a “wobbler,” meaning that it may be punished as either a felony or misdemeanor. (Pen. Code, § 489, subd. (c).) Prior to Proposition 47, most theft offenses had to meet the \$950 threshold in order to be charged as a felony. This threshold did not apply to certain offenses such as receiving stolen property, fraud and forgery which were punishable as wobblers. Also, in cases of retail theft, prosecutors had the option of charging a person with second degree burglary, which was punishable as a wobbler without having to reach the \$950 threshold. However, the provisions of Proposition 47 specifically required that the crime of “shoplifting” be punished as a misdemeanor. “Shoplifting” was defined by the initiative 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.” (Pen. Code, § 459.5; Proposition 47, approved by California voters on Nov. 4, 2014.)

Robbery is defined as “felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (Pen. Code, § 211.) Robbery is also separated into two degrees: first degree and second degree. First degree robbery occurs when the victim of the robbery is of a driver or passenger of a vehicle operated for a fare or hire; when the victim is robbed while at home or other residential dwelling; or when the victim is in the process of using, or immediately after using, an automated teller machine (ATM). Robbery in the second degree is any type of robbery that is not specified as first degree robbery. Both robbery in the first degree and second degree are felonies regardless of the level of force or fear used in the taking or escape after the taking or the value of the goods stolen.

This bill creates within the crime of petty theft two separate degrees: first degree and second degree. First degree petty theft would be defined as the taking of property valued at \$950 or less from the person of another or from a commercial establishment by means of force or fear without the use of a deadly weapon or great bodily injury. Any other form of petty theft would be second degree petty theft. First degree petty theft would be punishable as a misdemeanor with up to one year imprisonment and a fine of up to \$1000. Second degree petty theft would be punishable as a misdemeanor with up to six months imprisonment and a fine of up to \$1000.

The change in the theft laws proposed by this bill would apply retroactively. A person who is currently incarcerated or has previously been convicted of robbery would be authorized to petition the court for recall and resentencing if the facts of their case would meet the new elements of first degree petty theft. The bill requires the petition to include a declaration by the

petitioner that they are eligible for relief; the superior court case number and year of the conviction; and whether the petitioner requests counsel.

The prosecutor must prove beyond a reasonable doubt that the petitioner is ineligible for relief. This standard of proof is the highest standard in criminal law and is typically used in jury trials but is also found in resentencing provisions enacted with the recent changes to the law on felony-murder (SB 1437, Ch. 1015, Stats. 2018; Pen. Code, § 1170.95, subd. (d)(3).) If the prosecutor fails to meet this burden, the petitioner's conviction shall be vacated and the petitioner shall be resentenced on any remaining charges. Both parties may also agree to waive the hearing and stipulate that the petitioner is eligible for relief.

### 3. Committee on Revision of the Penal Code

On January 1, 2020, the Committee on the Revision of the Penal Code ("Committee") was established within the Law Review Commission to study the Penal Code and recommend statutory reforms. (SB 94, Ch. 25, Stats. 2019; Gov. Code, § 8280.) The Committee's objectives are as follows:

- (1) Simplify and rationalize the substance of criminal law;
- (2) Simplify and rationalize criminal procedures;
- (3) Establish alternatives to incarceration that will aid in the rehabilitation of offenders; and,
- (4) Improve the system of parole and probation.

(Gov. Code, § 8290.5, subd. (a).) In making recommendations to achieve these objectives, the Committee may recommend adjustments to the length of sentence terms. (Gov. Code, § 8290.5, subd. (b).) The Committee is required to prepare an annual report that describes its work in the prior calendar year and its expected work for the subsequent calendar year. (Gov. Code, § 8293, subd. (b).)

After holding meetings over the course of a year and hearing from multitudes of witnesses, including Governor Newsom, former Governor Brown, Attorney General Becerra, and other stakeholders involved in the criminal justice system such as law enforcement groups, public defenders, victims' advocates, and formerly incarcerated individuals, on February 9, 2021, the Committee released its first annual report describing the Committee's work and recommendations. The Committee members unanimously recommended ten reforms to the Penal Code. (See <[clrc.ca.gov/CRPC/About/History.html](http://clrc.ca.gov/CRPC/About/History.html)> [as of Mar. 1, 2021].)

One of the Committee's recommendations is to establish that low-value thefts without serious injury or use of a weapon are misdemeanors. According to the Committee's report:

California's robbery statute has not been updated since 1872. Over the years, the punishment has been extended to a violent felony with a mandatory prison sentence of up to five years, without enhancements. At the same time, courts have also expanded the conduct that constitutes robbery to cover thefts of any value, even when there is no weapon involved nor physical injury to the victim. Additionally, the number of people currently in prison for robbery in California are disproportionately people of color.

The Penal Code defines robbery as any taking of any property, regardless of value, if “accomplished by means of force or fear.” Following the landmark *People v. Estes* case in 1983, courts have allowed prosecutors to charge robbery in cases that were previously considered simple shoplifting. In effect, shoplifting can be elevated from a mandatory misdemeanor to a violent crime with a mandatory sentence to state prison. Purse snatches and stealing a cell phone can also be considered robbery, even if a victim is not physically touched. In addition, robbery’s automatic classification as a “violent felony,” regardless of the circumstances, can subject a person to enhanced penalties, including a life sentence under the Three Strikes law.

“*Estes* robberies” are extremely common. In 2019, over 8,000 unarmed commercial robberies were reported throughout the state.

When Alameda District Attorney O’Malley, then-president of the District Attorneys’ Association, appeared before the Committee in April 2020, she said that *Estes* robberies are often low-level crimes that her office recommended for less severe sanctions, including diversion and treatment, rather than incarceration. Santa Clara County District Attorney Jeff Rosen and San Mateo County District Attorney Stephen Wagstaffe also suggested limiting prosecutors’ ability to charge these types of cases as violent robberies. District Attorney Wagstaffe added that if *Estes* robberies were eliminated, “I wouldn’t sit there and say, ‘Oh my heavens, you’ve taken one of our great tools in protecting public safety.’” While people charged in *Estes* cases often end up pleading guilty to a lesser offense, including grand theft from a person, charging an offense that carries steep penalties greatly impacts a defendant’s ability to negotiate a reasonable plea agreement.

California is currently out of step with other states, which distinguish between different types of thefts and forbid thefts involving minor use of force or fear from being charged as robberies or other felonies. [Examples provided by the report include Texas and Illinois which make it a misdemeanor for pushing a store employee while shoplifting and New York and Oregon that make the same crime a low-level felony; Vermont requires some bodily injury to be inflicted for robbery to apply. (See pg. 35.)]

....

The Committee recommends adding a new offense to this hierarchy: petty theft in the first degree, punished as a misdemeanor. The offense would cover any thefts from a person or commercial establishment that involved the use of force or fear but where no serious injury was caused and no deadly weapon was used.

(*Annual Report and Recommendations 2020*, Committee on Revision of the Penal Code, pp. 32-34, fn. omitted.) This bill would codify the Committee’s recommendation.

#### **4. Author’s Amendments to be Taken in Committee**

The author intends to amend the bill in committee to exempt organized retail theft from the crime of petty theft in the first degree.

## 5. Argument in Support

According to Prosecutors Alliance of California:

California's robbery statute has not been updated since 1872, and still allows people to be sentenced to substantial terms in prison for minor thefts in cases where the incident involved a perception of fear or a very minimal use of force. This allows prosecutors to charge some types of simple theft, such as shoplifting or snatching a cell phone, as felony robbery. The blurred interpretation between robbery and theft has resulted in convictions and lengthy prison sentences disproportionate to the crime.

SB 82 will establish a clear distinction between theft and robbery by creating a second category of petty theft for cases where no deadly weapon was used and no one was seriously injured, but where there may have been an inadvertent use of force. The Committee on the Revision of Penal Code, which includes judges in its membership, discussed at length the need to address the problem of theft being charged as robbery and recommended the code changes contained in SB 82. New York, Oregon, Illinois and Texas are among the states that have enacted similar statutes.

## 6. Argument in Opposition

According to the Alameda County District Attorney:

The answer to this issue is not to essentially eliminate the crime of robbery, which is violent. Rather, the answer is to provide resource options to the offenders to stop the continued criminal conduct. You can hear more on my PODCAST "Justice For All" a 2-part series with repeat offenders who have been criminal justice involved and are now working within my programs to help other individuals to move beyond criminal justice. They move beyond criminal justice with the help and resources of organizations like my Office. They needed help and we provided it.

My Office is very prudent in charging crimes. We have created several programs that are designed to move individuals out of the criminal justice system and into a productive pathway of their lives. We have had tremendous success in programs such as Early Intervention Court, Mentor Diversion, Alameda County Justice Restoration Court, Behavioral Health Court, Veterans Court and more. These individuals, many of whom have committed and are charged with robbery, involving violent takings of property from another, have successfully removed themselves from the criminal justice system into a productive life. Their successful completion generally involves dismissal of the charges, with the knowledge of the victim of crime. We have utilized Restorative Justice processes; we have a partnership with Cypress Mandela, a job training program in Oakland and programs that provide life resources for those who have been criminal justice involved.