SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No:	AB 2356	**Hearing Date:**	May 31, 2022
Author:	Rodriguez		
Version:	April 7, 2022		
Urgency:	No	**Fiscal:**	No
Consultant:	SC		

Subject: ***Theft: aggregation***

HISTORY

Source: Author

Prior Legislation: AB 331 (Jones-Sawyer), Ch. 113, Stats. 2021
AB 1772 (Chau), failed passage Assembly Public Safety, 2019
AB 1065 (Jones-Sawyer), Ch. 1065, Stats. 2018
AB 3011 (Chau), failed passage Assembly Public Safety, 2018
AB 2372 (Ammiano), Ch. 693, Stats. 2010
AB 2705 (Goldberg), vetoed, 2004

Support: California Statewide Law Enforcement Association; City of Chino Hills

Opposition: None known

Assembly Floor Vote: 62 - 0

PURPOSE

The purpose of this bill is to specify that if the value of property taken exceeds $950 over the course of distinct but related acts, the value of the property may be aggregated to charge a count of grand theft, if the acts are motivated by one intention, one general impulse, and one plan.

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).)

This bill provides that if the value of the money, labor, real property, or personal property taken exceeds $950 over the course of distinct but related acts, the value of the money, labor, real property, or personal property taken may properly be aggregated to charge a count of grand theft, if the acts are motivated by one intention, one general impulse, and one plan.

This bill states that the change made by this bill is declaratory of existing law in *People v. Bailey* (1961) 55 Cal.2d 514.

COMMENTS

1. Need for This Bill

According to the author of this bill:

> Under existing law, participants who have organized to steal property from a retailer and who each steal less than $950 may only be charged with petty theft, but the loss to the retailer may be in the thousands of dollars. AB 2356 would more accurately reflect the nature of the crime and would give local law enforcement and district attorneys greater discretion in the filing and disposition of criminal cases.

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.) The crime of petty theft with a prior was also limited by the initiative to only apply to individuals with specified prior convictions. (Pen. Code, § 666; *People v. Rivera*, *supra*, 233 Cal.App.4th at p. 1091.)

Proposition 47 added Penal Code section 490.2 to expressly define petty theft as "obtaining any property by theft where the value of the money, labor, real or personal property taken" does not exceed $950. The law states that this new definition of petty theft applies notwithstanding "any other provision of law defining grand theft." (Pen. Code, § 490.2, subd. (a).)

Proposition 47 also created the new offense of shoplifting, a misdemeanor, which is defined 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 nine hundred fifty dollars ($950)." (Pen. Code, § 459.5.) Any other entry into a commercial establishment with intent to commit larceny is burglary. (*Ibid*.)

This bill would allow felony punishment for a series of distinct but related thefts if the aggregate value of the property taken or intended to be taken exceeds $950, and the thefts are motivated by one intention, one general impulse, and one plan.

3. People v. Bailey: Aggregation of Value from Multiple Theft Offenses

Multiple acts of theft can be aggregated and prosecuted as one felony if they are conducted pursuant to one intention, one general impulse, and one plan. (See *People v. Bailey* (1961) 55 Cal.2d 514, 518-519.) In the context of petty theft versus grand theft, when charges of theft are aggregated, the value of the contents stolen can also be aggregated so instead of being charged with multiple misdemeanor offenses (where the value of each item stolen is less than $950) the defendant may be charged with a single felony when the value of the items stolen can be added together to breach the $950 threshold.

The defendant in *Bailey* made a single fraudulent misrepresentation about her household income that caused her to receive a stream of welfare payments. (*Id*. at pp. 515–516.) While each individual payment fell below the felony threshold, the aggregated total constituted grand theft. *(Id*. at p. 518.) The California Supreme Court concluded that the payments could be aggregated because "the evidence established that there was only one intention, one general impulse, and one plan." (*Id*. at p. 519; see also CALCRIM No. 1802 [Theft: As Part of Overall Plan].)

The California Supreme Court addressed the *Bailey* rule in *People v. Whitmer* (2014) 59 Cal.4th 733. In *Whitmer*, the defendant arranged for the fraudulent sale of 20 motorcycles, motorized dirt bikes, all-terrain vehicles, and similar recreational vehicles. The defendant was convicted of multiple thefts. (*Id*. at pp. 735-736.) The defendant appealed, arguing that under *Bailey* he should have been convicted of a single theft. The Supreme Court distinguished the facts in *Whitmer* from what occurred in *Bailey,* and found that multiple theft convictions were appropriate because each count of theft was based on a separate and distinct fraudulent act. (*Whitmer, supra*. at p. 740.) The court in *Whitmer* pointed out that *Bailey* concerned a single fraudulent act followed by

a series of payments. In a concurring opinion. Justice Liu distinguished acts committed with a common scheme from acts committed as part of a single impulse. (*Whitmer, supra,* at p. 748, concur. opn. J. Liu.) Justice Liu went on to state that ". . ., separate and distinct takings do not fall under *Bailey*'s aggregation rule simply because, as here, they were all done the same way. But neither does the mere fact that multiple takings are separate and distinct entail a finding of multiple thefts in every case. If the takings were committed pursuant to a single intention, impulse, and plan, then under *Bailey* they amount to only one theft."

This bill would codify existing case law that authorizes aggregation of multiple acts of theft in specified situations pursuant to *Bailey, supra*, 55 Cal.2d 514.

4. Argument in Support

According to California Statewide Law Enforcement Association:

> Proposition 47, the Safe Neighborhoods and Schools Act, reclassified certain crimes from felonies to misdemeanors, including certain cases of theft that don't exceed $950 are punishable as a misdemeanor. Due to this change, law enforcement agencies have seen a dramatic spike in cases of theft where money, labor, or real or personal property is taken. By increasing the scope of what constitutes grand theft to stipulate that grand theft occurs when property exceeding $950 is taken by one person and is aggregated over the course of distinct but related acts, law enforcement will be better equipped to intervene.

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