
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No: SB 358 **Hearing Date:** April 13, 2021
Author: Jones
Version: February 9, 2021
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Property crimes: unlawful entry onto property*

HISTORY

Source: Author

Prior Legislation: SB 979 (Jones), failed passage Sen. Public Safety, 2020
AB 1210 (Low), died in Assem. Approps., 2020

Support: Southwest California Legislative Council

Opposition: American Civil Liberties Union of California; Asian Solidarity Collective;
California Public Defenders Association; California State Sheriffs' Association;
Drug Policy Alliance; Ella Baker Center for Human Rights; Peace Officers
Research Association of California; Pillars of the Community; Showing up for
Racial Justice San Diego; Showing up for Racial Justice North County; Team
Justice; Think Dignity; We the People – San Diego

PURPOSE

The purpose of this bill is to create a new crime with penalties graduating from a misdemeanor to an alternate felony/misdemeanor to enter the property adjacent to a dwelling with the intent to steal a package that has been shipped to the dwelling.

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. (Pen. Code, § 490.)

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

Existing law generally provides that obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed \$950 shall be considered petty theft and shall be punished as a misdemeanor, except when a person has one or more prior qualifying convictions, such person may be subject to a felony. (Pen. Code, § 490.2; Proposition 47, approved by California voters on Nov. 4, 2014.)

Existing law specifies that a burglary of an inhabited dwelling or vessel which is inhabited and designed for habitation, floating home, or trailer coach, or the inhabited portion of any other building, is burglary of the first degree. (Pen. Code, § 460, subd. (a).)

Existing law provides that all other types of burglary is burglary in the second degree. (Pen. Code, § 460, subd. (b).)

Existing law provides the following penalties for burglary:

- Burglary in the first degree is punishable by imprisonment in the state prison for 2, 4 or 6 years; and,
- Burglary in the second degree is punishable as an alternate felony/misdemeanor by imprisonment in the county jail not exceeding one year or imprisonment in county jail for 18 months, 2 or 3 years. (Pen. Code, § 461.)

Existing law states that every person who commits mail theft, as defined, is guilty of a crime, and shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment. (Pen. Code, § 530.5, subd. (e).)

This bill creates a crime for a person to enter the curtilage of a residential dwelling with the intent to commit theft of a package shipped through the mail or delivered by a public or private carrier.

This bill defines “curtilage” as “an area adjacent to or in the immediate area of the residential dwelling, and to which the activity of residential life extends, including, but not limited to, a porch, doorstep, patio, stoop, driveway, hallway, or enclosed yard.”

This bill provides that a violation of the provisions of this bill are punishable as a misdemeanor by imprisonment in a county jail not exceeding one year.

This bill specifies that a third or subsequent violation of the provisions of this bill within a 36-month period is punishable as either a misdemeanor by imprisonment in county jail not exceeding one year or as a realigned felony in county jail.

COMMENTS

1. Need for This Bill

According to the author of this bill:

More Americans than ever are doing their shopping online. According to the Department of Commerce, as of September 2018, approximately 10 percent of all

retail sales in the United States occurred online. The growing number of retail products delivered to our doorsteps has resulted in a dramatic increase in the number of thieves targeting the porches, patios, and doorsteps of online shoppers. During the holiday season, porch thefts surge. Between November and December 2019, 59.4 million Americans (18%) had a package stolen from their front porch or doorstep. This number is an increase from 26.1 million porch thefts during the holidays in 2018, according to a study from InsuranceQuotes.

While package thefts are increasing everywhere, California has the worst porch theft problem in America. According to a 2019 report by SafeWise, 30 percent of stolen packages in the nation are being stolen in California. This report also indicated that six California cities were among the top 20 cities with the most stolen packages in the nation: San Francisco, Oakland, San Jose, Los Angeles, Sacramento, Stockton, and Modesto. San Francisco ranked number one nationwide.

Under federal law, the theft of packages delivered by the United States Postal Service can be prosecuted as a felony. Under state law, however, unless the items contained in the stolen package are valued at more than \$950, theft of a privately delivered package may only be prosecuted as a misdemeanor. Thus, a thief could steal 10 packages from 10 different porches on the same day – on the same street – and will only be charged with a misdemeanor, so long as none of the packages contained items worth more than \$950. However, the perpetrator does not know the value of what is inside the box when they steal the package. Entry onto the curtilage of a residential dwelling with the intent to steal comes with elevated dangers (to both the perpetrator and victim), and involves a breach of personal privacy and security much greater than the typical theft.

2. \$950 Threshold Value for Grand Theft

Existing law separates theft into two degrees: petty theft and grand theft. Unless otherwise specified, grand theft is committed when the money, labor, or real or personal property taken is of a value exceeding \$950. (Pen. Code, § 487.) All other theft is petty theft. (Pen. Code, § 488.)

The current threshold amount to constitute grand theft requires a taking or loss in excess of \$950 which was established through legislation in 2010. (AB 2373 (Ammiano) Chapter 693, Statutes of 2010.) Prior to that change in the law, the amount was \$400 or more which was established in the 1982-83 Legislative Session. (Chapter 375, Statutes of 1982.) The previous amount of \$200 was established in 1923; up to that time, the threshold amount was \$50. As pointed out by the committee analysis for AB 2372, “As measured by the change in the Consumer Price Index, goods or services with a value of \$400 today were worth only \$184 in 1983. Expressed another way, goods with a value of \$400 in 1983 are worth \$870 today. Thus, many crimes that qualify as grand theft today would not have been grand theft in 1983. Theft of property worth \$870 in 2010 dollars (for example, a leather coat) could not have been grand theft in 1983 when the current theft thresholds took effect.” (Assem. Comm. on Public Safety, Analysis of Assem. Bill No. 2372 (2009-2010 Reg. Sess.) as amended Mar. 11, 2010, p. 2.)

Grand theft is punishable as a “wobbler,” meaning that it may be punished as either a felony or misdemeanor. (Pen. Code, § 489, subd. (c).) Petty theft is punishable as a misdemeanor. (Pen.

Code, § 490.) Thus, under existing law, a person may be charged with a felony for stealing packages if the value of items taken exceeds \$950.

This bill creates elevated penalties for the crime of entering “an area adjacent to or in the immediate area of the dwelling” such as “a porch, doorstep, patio, stoop, driveway, hallway, or enclosed yard” with intent to steal a package, regardless of the value of the items taken. Additionally, the bill does not require that a theft of attempted theft occurred; rather a person would be guilty of the offense if there were some showing of an intent to steal the package. On a first or second violation, the person may face increased misdemeanor penalties of up to one year imprisonment in county jail. On a third or subsequent violation, the person may be charged with either a felony or a misdemeanor.

3. Proposition 47 and Theft Offenses

Proposition 47, approved by voters on November 4, 2014, 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 offenses made misdemeanors by Proposition 47 also include: the new offense of commercial burglary 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 petty theft with a prior theft conviction. (Pen. Code, § 666; *People v. Rivera, supra*, 233 Cal.App.4th at p. 1091.) 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.)

Generally, when the Legislature attempts to amend a law enacted through a voter initiative, the California Constitution provides, “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.

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." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014), Text of Proposed Laws, p. 74.)

This bill would make it a crime to enter the curtilage of a home with the intent to commit theft of a package shipped through the mail or delivered by a public or private carrier. The crime defined by this bill is not dependent on the value of the property intended to be stolen. This bill would make conduct that would currently constitute misdemeanor petty theft (property value under \$950), punishable as a felony. It also creates enhanced penalties based on prior thefts which is similar to a provision deleted by Proposition 47. (Prior Pen. Code § 666.) Although the \$950 threshold for grand theft was enacted through legislation in 2010 (see Note 3), this bill still frustrates the intent of Proposition 47 which is require misdemeanor penalties for nonserious, nonviolent crimes like theft of \$950 or less.

The drafters of the bill's language have interpreted the bill as creating an expanded definition of trespass rather than making changes to theft provisions affected by Proposition 47, thus the bill requires a majority vote to pass the Legislature instead of having to go before the voters. However, because the Proposition's text is to be construed liberally to give effect to the intended purpose of its provisions (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933), the drafters' interpretation that this bill does not amend Proposition 47 may be subject to legal challenges.

4. Overview of Relevant Laws

In addition to the general petty theft and grand theft laws, there are several other laws that are relevant to the conduct punished by this bill:

a. Burglary

Burglary of an inhabited dwelling house or structure is first degree burglary and punishable as a felony. (Pen. Code, § 461.) An inhabited dwelling house has been interpreted by case law to mean ". . . a structure where people ordinarily live and which is currently being used for dwelling purposes. A place is an inhabited dwelling if a person with possessory rights uses the place as sleeping quarters intending to continue doing so in the future. There may be more than one dwelling under the same roof. Apartments and hotel rooms may be the dwelling house of persons living in them." (*People v. Fleetwood* (1985) 171 Cal.App.3d. 982, 987-988.) Inhabited houses and apartments are included in this definition. It also can include hospital rooms, motel rooms, and campers.

"Courts have broadly interpreted the term "inhabited dwelling house" to include a variety of structures and places in order to effect the legislative purpose of the burglary statutes—to protect the peaceful occupation of one's residence against intrusion and violence. In determining whether a structure is part of an inhabited dwelling, the essential inquiry is whether the structure is functionally interconnected with and immediately contiguous to other portions of the house. "Functionally interconnected" means used in related or complementary ways. "Contiguous" means adjacent, adjoining, nearby, or close." (*People v. Thorn* (2009) 176 Cal.App.4th 255, 261-262.) Courts have also included in certain cases garages, carports, and balconies as a dwelling structure for

purposes of residential burglary. (*People v. Gilbert* (1961) 188 Cal.App.2d 723; *People v. Thorn, supra*, 176 Cal.App.4th 255; *People v. Yarborough* (2012) 54 Cal.4th 889.)

The burglary laws are primarily designed, not to deter trespass and the intended crime, which are prohibited by other laws, but rather to protect against dangerous situations to personal safety created by a violation of the occupant's possessory interest in the building. (*People v. Thorn, supra*, 176 Cal.App.4th at 264.)

This bill creates a new crime for a person to enter the curtilage of a residential dwelling with the intent to commit theft of a package shipped through the mail or delivered by a public or private carrier. "Curtilage" is defined as "an area adjacent to or in the immediate area of the residential dwelling, and to which the activity of residential life extends, including, but not limited to, a porch, doorstep, patio, stoop, driveway, hallway, or enclosed yard." Depending on the facts of the case, a person who violates the provisions in this bill could be charged with burglary of a residential building or structure which is punishable as a felony.

b. Trespass

Trespass laws prohibit against entering real property or structures of any kind without the consent of the owner. Statutorily defined circumstances that may constitute trespass are numerous and specifically includes trespass of real property or structures without the consent of the owner. (Pen. Code, § 602, subd. (m).) Trespass of real property requires unlawful entry as well as occupation or intent to occupy which means the person usually stays on the property until removed. A person who intends to commit package theft would not have intent to occupy, so this type of trespass would not apply, but another form may, such as returning to private property once a person is told to leave. (Pen. Code, § 602, subd. (o).)

c. Mail Theft

There is a specific law for mail theft, however, that law references federal mail theft which requires that the package or letter was in the U.S. Postal Services possession or in a mail receptacle at the time of the theft. (Pen. Code, § 530.5, subd. (e) and 18 U.S.C.S. 1708.) Mail theft is punishable as a misdemeanor punishable by imprisonment for up to one year in jail, or if charged under federal law, imprisonment for up to 5 years.

d. Loitering

Loitering to commit a crime is a misdemeanor. According to subdivision (h) of Penal Code section 647, a person who loiters, prowls, or wanders upon the private property of another, at any time, without visible or lawful business with the owner or occupant. For purposes of subdivision (h) "loiter" means to delay or linger without a lawful purpose for being on the property and for the purpose of committing a crime as opportunity may be discovered. A person who goes on to the private property of another person to ascertain if anyone is home and to takes a package on the property appears to violate this code section.

e. Appropriation of Lost Property

A person who finds lost property under circumstances which give them knowledge of or means of inquiry as to the true owner, and who appropriates such property to his own use, or the use of another person not entitled to the property, without first making reasonable and just efforts to find the owner and restore the property, is guilty of theft. (Pen. Code, § 485.) This crime is punishable as either a misdemeanor or felony, subject to the \$950 threshold. In some reported cases of package theft, the suspect is seen carrying packages that are addressed to other people rather than being caught taking the package. In this scenario, the person could be charged with appropriation of lost property because while there might not be evidence that the person stole the package, there is evidence that the package was addressed to the true owner of the package and the suspect had not made an effort to find the owner.

Ultimately, the crimes that a person is charged with depends on the facts of each case and the discretion of prosecutors. However, it appears that there are several code sections in addition to existing theft provisions that already may be used to address the crime of package theft.

5. Increasing Penalties Has Minimal Deterrent Effect; Swift and Certain Punishment More Likely to Influence Criminal Behavior

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 that the incremental deterrent effect of increases in lengthy prison sentences is modest at best; rather the decision to commit a crime is more likely influenced by the certainty and swiftness of punishment than the severity of the criminal sanction. (*Id.* at p. 345.)

This bill increases the potential sentence for a person who commits package theft on or near a person's residence. Generally, the crime the person would be charged with depends on the value of the property stolen (\$950 or less is a misdemeanor and punishable by imprisonment of up to 6 months). This bill would make it a misdemeanor punishable by imprisonment for up to one year for the first two violations of the new offense, and an alternate felony-misdemeanor for a third or subsequent violation.

One of the arguments by proponents of this bill is existing law punishes this crime as a "mere misdemeanor" and the person may end up having their charges dismissed or serving zero jail time. However, conviction of a misdemeanor can have a substantial impact on a defendant. Conviction of a misdemeanor results in the direct consequences of jail, fines, and court supervision. Any person who is charged with multiple misdemeanor offenses is unlikely to have their charges dismissed or to be released without serving jail time. Conviction of a misdemeanor also results in significant collateral consequences in areas like employment and professional licensing.

Additionally, increasing penalties for this crime does not change the circumstances that make the law difficult to enforce. Thus, such an increase is unlikely to lead to more arrests or prosecutions or otherwise deter this conduct. Package theft faces enforcement issues because identifying and apprehending the person committing the offense is difficult. Often times, the crimes happen without someone noticing until the package has already been stolen. If an outdoor camera is installed, the theft may be caught on camera but that doesn't necessarily mean that the person committing the theft can be identified or later found by police.

5. Argument in Support

According to the Southwest California Legislative Council (SWCLC):

The SWCLC is pleased to SUPPORT SB 358 (Jones). SB 358 expands the definition of burglary to cover the more recent phenomenon of 'porch piracy', placing that crime into the same status as actually entering a property for the purpose of theft.

This is a growing neighborhood menace as one in three Americans report having at least one package stolen during the past year resulting in \$25 million of lost goods and services every day - \$5.4 billion estimated in 2020. Yet only about 10% of pirates are apprehended and even then, in the state of California, their offense is a mere misdemeanor charge resulting in a maximum 1 year sentence, but all too frequently simply dismissed or paroled to re-offend. SB 358 would allow prosecutors to charge a "porch pirate" with a misdemeanor or with a felony in the third or subsequent conviction during a 36-month period.

6. Argument in Opposition

According to the American Civil Liberties Union of California:

Under existing law, a person can already be prosecuted for entering the curtilage of a home with the intent to commit theft. Indeed, depending on the circumstances, a person could be convicted of trespassing; attempted grand theft; attempted petty theft; or attempted receipt of stolen property. If the person actually takes the package, they can be convicted of a slew of other crimes, including grand theft; petty theft; and mail theft. As former Governor Jerry Brown said, “[t]his multiplication and particularization of criminal behavior creates increasing complexity without commensurate benefit.” Given the availability of existing laws, we do not believe a separate crime is necessary.

We are also concerned that SB 979 could be applied in a discriminatory manner. In particular, we fear that the bill could be used as a pretext for arresting people against whom law enforcement or property owners are explicitly or implicitly biased. It is not difficult to imagine a situation where homeowners in a predominantly white and wealthy community notice – either through their own observations, or their neighbors’ posts on a site like Nextdoor – that a small group of Black teenagers in hooded sweatshirts is walking from house to house, up paths and onto front porches where they pause briefly and then leave. The homeowners become suspicious and call the police who then arrest the boys. As it turns out, the boys were leaving flyers for a local fundraiser, not intending to steal packages. Likewise, a situation could arise in which police officers arrest or detain a homeless person who is sitting on the front steps of a home simply because the officers notice a package on the stoop. Needless to say, had the group of teenagers been white, or the homeless person had been a businessman dressed in a suit and tie, their presence near the homes would likely have garnered different reactions from the homeowners and the officers. Although these issues of discrimination and bias already occur today, the creation of a new crime will only exacerbate these problems.

While we understand and appreciate your interest in preventing package theft, we do not believe this bill will accomplish that purpose and may instead inadvertently promote racial and other profiling. To the extent that existing crimes mentioned above are not being utilized to prosecute people for package-theft-related crimes, that enforcement concern will not be addressed by creating yet another crime.

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