

Date of Hearing: March 23, 2021  
Counsel: Cheryl Anderson

## ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

AB 395 (Lackey) – As Introduced February 3, 2021

**SUMMARY:** Creates a new and separate crime of forcibly entering a vehicle with the intent to commit a theft inside. Specifically, **this bill:**

- 1) Creates a new crime of forcibly entering a vehicle with the intent to commit theft.
- 2) Punishes this offense either as a misdemeanor with incarceration not to exceed one year in the county jail, or as a felony with imprisonment in the county jail for 16 months, or two, or three years under criminal justice realignment.
- 3) Defines “forcible entry” as entry accomplished through either of the following means:
  - a) Force that damages the exterior of the vehicle, including, but not limited to, breaking a window, cutting a convertible top, punching a lock, or prying open a door; or
  - b) Use of a tool or device that manipulates the locking mechanism, including, without limitation, a slim jim or other lockout tool, a shaved key, jiggle key, or lock pick, or an electronic device such as a signal extender.
- 4) Prohibits a person from being convicted both under this provision and the existing auto burglary statute.

**EXISTING LAW:**

- 1) States that any person who enters any house, room, apartment, ...shop, warehouse, store, ... outhouse or other building, tent, vessel, ... *vehicle ...when the doors are locked*, aircraft ... or mine ... with the intent to commit grand or petit larceny or any other felony is guilty of burglary. (Pen. Code, § 459 [emphasis added].)
- 2) States that burglary of an inhabited dwelling is first degree burglary, and that all other kinds of burglary are of the second degree. (Pen. Code, § 460.)
- 3) Provides that the punishment for first degree burglary is imprisonment in the state prison for two, four, or six years. (Pen. Code, § 461, subd. (a).)
- 4) Provides that the punishment for second degree burglary is either confinement of up to one year in the county jail, or confinement in the county jail for 16 months, two, or three years pursuant to criminal justice realignment. (Pen. Code, §§ 18, subd. (a), 461, subd. (b), 1170,

subd. (h).)

- 5) Provides that no person shall willfully injure or tamper with any vehicle or the contents thereof or break or remove any part of a vehicle without the consent of the owner. (Veh. Code, § 10852.)
- 6) Provides that the punishment for vehicle tampering is confinement of up to six months in the county jail, a fine not to exceed \$1,000, or both. (Veh. Code, §§ 42002, 40000.9.)

**FISCAL EFFECT:** Unknown

**COMMENTS:**

- 1) **Author's Statement:** According to the author, "Vehicle burglaries or 'smash-and-grabs' have increased since more drivers are not using or checking their vehicles for longer periods of time due to the pandemic, according to the Automobile Club of Southern California. In addition, the latest statistics from the California Department of Justice's dataset show that vehicle burglaries have been on the rise.

"Existing law requires proof beyond a reasonable doubt that vehicle's doors were locked in order for the crime to be considered felony burglary. Even with evidence of forced entry (e.g. smashed window), the vehicle's owner still has to prove in court that their vehicle was locked. This process becomes burdensome for victims who have their vehicles broken into while visiting other cities.

"It takes merely seconds to break into a vehicle and steal valuable items but its effect on the victim lasts much longer. This bill signifies that Californians have had enough with letting offenders walk away without punishment and it is time for the state to hold offenders accountable for the distress they cause for victims."

- 2) **Elements Required for Auto Burglary Prosecutions:** In order to convict a person under the current auto burglary statute, Penal Code section 459, the prosecutor must prove that (1) the defendant entered a locked vehicle, and (2) when the defendant entered the locked vehicle they intended to commit theft (or any other felony). (See CALCRIM No. 1700, see also *People v. Teamer* (1993) 20 Cal.App.4th 1454, 1457–1461.)

The common law element of "breaking" has never been an essential element of statutory burglary in California. The only exception is auto burglary, which requires that the doors of a vehicle be locked. In fact, that is the key element of auto burglary. While locked doors is an element, forced entry or use of burglary tools is not. (*In re James B.* (2003) 109 Cal.App.4th 862, 868.)

The element of "locked doors" has been interpreted to mean that the defendant must unlawfully alter the vehicle's locked state in some manner. (*In re James B.*, supra, 109 Cal.App.4th at p. 868.) On one end of the spectrum this could be accomplished by unlocking the vehicle without consent of the owner. At the opposite end, auto burglary could be committed by smashing a window. (*Ibid.*)

Some prosecutors argue that, particularly in cases where a victim is unavailable, such as with

tourists who cannot return to court, while there may be concrete evidence of a break in, it may prove difficult to establish that a vehicle was locked. And yet, convictions have been upheld based on circumstantial evidence to prove the requisite element of locking. For example, in *People v. Rivera* (2003) 109 Cal.App.4th 1241, the court upheld a conviction where there was evidence of forced entry even though there was no evidence that the doors were locked or sealed. Circumstantial evidence that the car's doors were locked was based on the car's windows being broken. (*Id.* at pp. 1244-1245.)

This bill seeks to create a new and separate crime of unlawful entry of a vehicle, the elements of which are forcible entry into the car, and the intent to steal property inside. In doing so, it would present an alternate theory of liability for the prosecutor to present. This bill would eliminate the prosecutor's duty to establish that a vehicle is locked, and instead require the prosecutor to prove forcible entry.

- 3) **Dual Convictions:** While this bill creates a new crime of unlawful entry of a vehicle with intent to steal, it does not repeal the current auto burglary statute, Penal Code section 459. Having two statutes involving similar conduct presents the possibility of double convictions for a single entry into a car. For example, when there is evidence that a person breaks into a locked car in a forcible manner, (i.e. smashing a window), if this bill is enacted, the prosecutor really has established the elements for both crimes. Convictions for two crimes for a singular act raises fairness concerns.

The concern is best illustrated with the crimes of theft and receiving stolen property. Common law principles prohibit dual convictions for both stealing and receiving the same property. This rule is based on the notion that a person who has stolen property cannot buy or receive that property from himself. (*People v. Ceja* (2010) 49 Cal.4th 1, 4-5, citing *People v. Allen* (1999) 21 Cal.4th 846, 850.) The Legislature codified this rule in 1992. (*People v. Ceja, supra*, 49 Cal.4th at p. 3.) Penal Code section 496 was amended to state, "No person may be convicted pursuant to this section and of the theft of the same property." (Pen. Code, §496, subd. (a).)

Similarly to the language contained in the receiving stolen property statute, this bill specifies that a person cannot be convicted of both this new crime and of auto burglary based on the act of breaking into a single car. A prosecutor will have discretion to charge a defendant with both crimes and will be able to present alternative theories of liability; however, the defendant may only be convicted of one crime or the other.

- 4) **Immigration Consequences:** A conviction of the new crime created by this bill poses potential immigration consequences for noncitizen defendants. A theft offense is an aggravated felony for immigration purposes if a one-year sentence is imposed. (8 USC § 1101(a)(43)(G) & (U).) Thus, if a term of one-year or more is imposed for this new offense, it will be a theft-related "aggravated felony" for immigration purposes. This triggers a host of immigration consequences, including deportability. (8 USC § 1227(a)(2)(A)(iii).) By contrast, a Ninth Circuit case has held that auto burglary under Penal Code section 459 is not a theft-related aggravated felony because it is an indivisible statute which can be violated by entering the locked vehicle with the intent to commit theft *or any felony*. (*Rendon v. Holder* (9<sup>th</sup> Cir. 2014) 764 F.3d 1077, 1084.)

The new theft offense created by this bill is also a crime of moral turpitude for immigration purposes which can pose consequences for noncitizen defendants. (*United States v. Esparza-Ponce* (9<sup>th</sup> Cir. 1999) 193 F.3d 1133, 1136 [theft is a crime of moral turpitude for immigration purposes].) Among other possible consequences, a crime of moral turpitude can render a noncitizen inadmissible (8 USC § 1182(a)(2)(A)(i)(I)) or deportable (8 USC § 1227(a)(2)(A)(i) & (ii)).

- 5) **Argument in Support:** According to the Los Angeles County Sheriff's Department: "California's current auto burglary statute requires proof that the vehicle was locked in order to establish the crime of auto burglary. Proving a vehicle was locked at the time of the break-in requires victims to appear in court and testify that their vehicle was in fact locked after they exited. This is highly problematic for cases that involve the tourist population. This makes prosecuting a case extremely difficult as the prosecution cannot produce a victim to testify their vehicle was locked at the time."
- 6) **Argument in Opposition:** According to the Immigrant Legal Resource Center: "We oppose the creation of the new offense of forced entry of a vehicle with "intent to commit theft," under AB 395, for two reasons.

"First, as we discussed when a version of this bill was introduced last year (AB 1921), this offense would have a *particularly harmful effect on noncitizens*. However, if the bill were amended to prohibit entry with 'intent to commit theft **or any felony**,' it is likely that it would prevent that particularly severe harm.

"Second, even if the amendment is added, we still would urge the Legislature not to create this new offense on the grounds that it is entirely redundant: it punishes conduct that is already covered by comparable existing criminal statutes that provide the same exposure, such as vandalism or theft. California need not create an unnecessary new offense at this historic moment, when it is striving reduce mass incarceration and overcriminalization. We will discuss each of these points.

**"Immigration consequences and effect of an amendment.** "Regarding the immigration effect, if AB 395 as written becomes law, convictions under the new statute will result in the deportation of noncitizen defendants in California and the accompanying destruction of California families. This threat also can make it more difficult for prosecutors to plea bargain in these types of cases. *See e.g. Jae Lee v. United States*, 137 S.Ct. 1958, 1961 (2017) (appellant said he would have rejected any plea leading to deportation in favor of throwing a "Hail Mary" at trial).

"As we explained last year, an offense with the elements of an unpermitted entry into a vehicle with *intent to commit theft* has at least two serious immigration consequences. It is a 'crime involving moral turpitude' for immigration consequences. Conviction can make a noncitizen deportable or inadmissible, and cause other penalties, depending on the circumstances.<sup>1</sup> Worse, if a year or more sentence is imposed on this new offense, it would

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<sup>1</sup> "See INA §§ 212(a)(2)(A)(i), 237(a)(2)(A) (inadmissible, deportable based on one or more convictions of a crime involving moral turpitude)."

be an aggravated felony as ‘attempted theft.’ Aggravated felonies carry some of the worst possible immigration consequences.<sup>2</sup>

“However, if the statute were amended to prohibit such an entry with ‘intent to commit theft or any felony,’ and if that phrase was interpreted the same way as it is in Penal Code § 459, the California burglary statute, then it is likely that these severe immigration penalties would not apply.

**“Statute is unnecessary.** Amending the statute to add ‘or any felony’ would address the specific immigration problem. However, we still argue that the statute should not create a new crime when that is not needed, and the crime is more serving to create publicity or please a public that may not understand how the law currently works.

“We recognize the motivation to address car break-ins. We understand that the California commercial burglary statute requires proof that the vehicle was locked, and that in some cases this proof is not available, so that the person will not be specifically convicted of burglary.

“The new offense would be an alternative felony/misdemeanor (‘wobbler’) offense that has a potential felony sentence of 16 months, two years, or three years (a ‘16/2/3’ wobbler). The conduct it prohibits already is covered by offenses, including 16/2/3 felonies that have almost no immigration consequences. In particular, damaging a locked or unlocked car by breaking the window, slashing a convertible top, or other means, is punishable under California law as vandalism, Penal Code § 594(a). Vandalism is punished as a 16/2/3 felony if the damage is at least \$400, and otherwise as a one-year misdemeanor.

“Along with vandalism, the person can be charged with stealing objects from the car, which is punishable as grand theft, Penal Code § 487, a 16/2/3 wobbler, or petty theft, Penal Code § 490, a misdemeanor. A defendant can be convicted of and sentenced for both vandalism and theft for the same incident. For less serious offenses, in many counties taking objects from a locked or unlocked car or otherwise tampering with the car is routinely prosecuted as vehicle tampering, Vehicle Code § 10852, a misdemeanor.

“For these reasons, the Immigrant Legal Resource Center strongly opposes these bills. At a time when the state is trying to reduce criminal and immigration penalties rather than increase them, we urge you to not create a bill that punishes behavior already covered by current laws, and that especially harms California’s large non-citizen population and the many U.S. citizens who are part of their families....”

## 7) **Related Legislation:**

- a) AB 308 (Chen) provides that the Board of State and Community Corrections (BSCC) shall administer grants to law enforcement agencies that participate in regional vehicle burglary and theft reduction joint task forces. AB 308 is set to be heard in this committee on March 23, 2021.

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<sup>2</sup> “See INA § 101(a)(43)(G), (U) (attempt to commit theft is an aggravated felony if a year or more is imposed).”

- b) SB 82 (Skinner) requires theft of property that is valued under \$950 and where specified circumstances are not present to be charged as a misdemeanor. SB 82 was re-referred to the Senate Committee on Appropriations on March 17, 2021.

**8) Prior Legislation:**

- a) AB 1921 (Diep), of the 2019-2020 Legislative Session, also would have created a new crime of unlawful entry of a vehicle. AB 1921 was not heard in this committee.
- b) SB 23 (Wiener), of the 2019-2020 Legislative Session, also would have created a new crime of unlawful entry of a vehicle. SB 23 was held in the Assembly Appropriations Committee.
- c) SB 916 (Wiener), of the 2017-2018 Legislative Session, also would have created a new crime of unlawful entry of a vehicle. SB 916 was held in the Senate Appropriations Committee.
- d) AB 476 (Kukykendall), of the 1997-1998 Legislative Session, would have expanded the crime of burglary to include entry into a vehicle, regardless of if the doors are locked, to commit a felony or theft. AB 476 failed passage in this committee.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

California District Attorneys Association  
California Police Chiefs Association  
California Travel Association (CALTIA)  
Los Angeles County Sheriff's Department  
National Insurance Crime Bureau  
Southwest California Legislative Council

**Opposition**

California Attorneys for Criminal Justice  
California Public Defenders Association  
Ella Baker Center for Human Rights  
Immigrant Legal Resource Center  
San Francisco Public Defender

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